Supreme Court
FILED

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No.

In The

Supreme Court of the United States

October Term, 1997

SOL SLOTNIK and DIANE REVERAND,

Petitioners,

vs.

VICTORIA DOWLING CONSIDINE
and THE SECOND INJURY FUND,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Connecticut

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether requiring an employer to pay wages under a state workers' compensation act to an undocumented alien who is not lawfully admitted for permanent residence in the United States or legally available for work under the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a, conflicts with the policies of the United States against the hiring and continued employment of unauthorized aliens contained in that act and this Court's decision in *Sure-Tan v. NLRB*, 467 U.S. 883 (1984)?

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Petitioners respectfully request that this Court issue a writ of certiorari to review the decision of the Connecticut Supreme Court in this case.

OPINIONS BELOW

The Connecticut Supreme Court opinion is reported at 244 Conn 781, 712 A.2d 396 (1998), and is reprinted in the Appendix hereto at 1a.[1] The Order denying the petition for reargument and for rehearing en banc is reprinted at 63a. The unpublished decisions of the Connecticut Workers' Compensation Commission and the Connecticut Compensation Review Board are reprinted at, respectively, 45a and 55a.

STATEMENT OF JURISDICTION

The Connecticut Supreme Court issued its decision on May 26, 1998. Petitioners filed an untimely motion for reargument and rehearing en banc; the Connecticut Supreme Court granted permission for the untimely filing of the motion for reargument, but denied the motion itself on June 25, 1998. This complies with the requirement of Rule 13.4 of this Court's Rules. See *Bowman v. Loperena*, 311 U.S. 262 (1940); *Federal Power Commission v. Idaho Power Company*, 344 U.S. 17 (1952).

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

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[1]References to the Appendix will hereinafter begin with the appropriate page number followed by the letter "a."

PERTINENT STATUTORY PROVISIONS

The statutory provision principally involved in this case is 8 U.S.C. §1324a(h)(3) of the Immigration Reform and Control Act of 1986 (the "IRCA") which defines an "unauthorized alien" to mean with respect to the alien's employment that the alien "is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General." The text of these statutes is reprinted in the Appendix beginning at 65a.

STATEMENT OF THE CASE

A. **Procedural Background**

Petitioners first raised the issues in this petition by moving to dismiss the workers' compensation proceeding on grounds that an undocumented alien was not an "employee" within the meaning of Section 31-275(9)(A)(1) of the Connecticut Workers' Compensation Act (the "Connecticut WCA") nor entitled to compensation thereunder because of the conflict with the IRCA.

Petitioners also asserted the same arguments as an affirmative defense at the compensation hearings. The workers' compensation commissioner (the "Commissioner") rejected petitioners' contentions in his findings of fact and conclusions of law. The Commissioner found, 51a:

> 40. The respondents claim a defense that the Commissioner does not have subject matter jurisdiction and claims that the claimant was an illegal alien and

not eligible to receive benefits under the State of Connecticut workers' compensation law. It is found that said defense has no legal merit and is denied.

Petitioners appealed the Commissioner's ruling to the Connecticut Compensation Review Board (the "Review Board") which affirmed the Commissioner's ruling in its decision dated February 9, 1997. 55a. The Review Board held, 58a -60a:

> "Included in the commissioner's decision was a rejection of the respondents' "illegal alien" defense. The respondents petitioned for review from that decision as well. . .Recently, this board decided that the definition of "employee" in §31-275(a) C.G.S. includes "any person" and is not limited to citizens or lawfully employed people. . .(citation omitted). . . we see no basis in these facts to distinguish this case. . .The fact that the United States government has criminalized the employment of illegal aliens in the Immigration Reform and Control Act, explicitly preempting state and local laws imposing civil or criminal sanctions on those hiring illegal aliens in the process, does not implicate the issue of workers' compensation benefits. . ."
>
> There is no relationship between the policies advanced by our Act and those

behind the federal IRCA, and the latter does not preclude application of the former.

Petitioners appealed the Compensation Board's decision to the Appellate Court, whereupon on motion, the Connecticut Supreme Court removed the appeal to itself for determination. In *Considine v. Slotnik*, 244 Conn, 781, 712 A.2d 396 (1998) the Connecticut Supreme Court held (4-1; McDonald, J. dissenting), inter alia, that: (i) the IRCA did not preempt the Connecticut WCA, (ii) an undocumented alien was an employee under the Connecticut WCA, and (iii) requiring an employer to pay wages to an undocumented alien while she is illegally present and not available for work in the United States did not conflict with the IRCA. 12a - 13a and 15a-16a.

B. **Statement of Facts**

In February 1994 respondent Victoria Dowling ("Dowling") began work as a child caretaker for petitioners Sol Slotnik and Diane Reverand (together "Slotnik") 2a. At the time she began her employment Dowling was an undocumented alien, and Slotnik knew this. 2a.

By virtue of her status as an illegal alien, Dowling violated Sections 1301, 1302, 1306 and 1325 of the Immigration and Nationality Act. 44a. These sections required an illegal alien, such as Dowling, to register within 30 days of entry into the United States (8 U.S.C. § 1302), notify the Attorney General within ten days of every change of address (8 U.S.C. § 1305) and provide civil and criminal penalties for violations thereof (8 U.S.C. §§ 1306 and 1325).

During the second week of her employment, Dowling slipped and fell injuring her arm. Dowling commenced an action for workers' compensation benefits, including wages, against Slotnik under the Connecticut WCA. 3a.

Slotnik alleged the workers' compensation commissioner (the "Commissioner") lacked subject matter jurisdiction because as an undocumented alien, Dowling was not an employee under Section 31-275(9)(A)(1) of the Connecticut WCA. 3a. Slotnik also contended that even if Dowling was an employee Dowling was not entitled to wages under the Connecticut WCA because as an undocumented alien, any such payment to her would be in conflict with the policies of Section 274A of the IRCA, 8 U.S.C. §1324a.

The Commissioner found that Dowling was an employee under the Connecticut WCA entitled to wages and all related benefits notwithstanding her status as an undocumented alien. 3a. Consistent with his finding the Commissioner awarded Dowling wages at the rate of $325.35 per week from June 24, 1994 to August 30, 1995, and ordered that Slotnik continue to pay Dowling her wages after August 30, 1995 subject to further documentation of her disability. 4a.

Dowling was an undocumented alien for the entire period covered by the Commissioner's award, and was not lawfully present in the United States nor legally available for work. 2a.

Slotnik appealed the Commissioner's decision to the Connecticut compensation review board (the "Compensation Board"). In February 1997 the Compensation Board also held that Dowling was an "employee" under the Connecticut WCA and that her status as an unauthorized alien under the

IRCA bore no relationship to her right to receive salary under the Connecticut WCA. 59a.

Slotnik appealed the Compensation Board's decision to the Connecticut Appellate Court. The Connecticut Supreme Court transferred the appeal to itself, and on May 26, 1996 the Connecticut Supreme Court issued its decision in Considine v. Slotnik, 244 Conn. 781, 712 A.2d 386 (1998) (McDonald, J. dissenting) holding inter alia, that: (i) an undocumented alien is an employee for all purposes under the Connecticut WCA; (ii) an undocumented alien may be awarded wages as compensation for her injury during time periods in which she is present in the United States and is legally unavailable for work, and (iii) the foregoing holdings do not conflict with and are not preempted by the IRCA and this Court's decision in *Sure-Tan v. NLRB,* 476 U.S. 883 (1984). 12a-13a; 15a-17a; 32a-33a.

In his dissent Justice McDonald held, 41a-43a:

> I do not agree that an illegal alien engaged in an illegal contract of employment is eligible for workers' compensation benefits. . .contrary to the majority I conclude that employment benefits are an incentive for illegal immigrants to enter or remain in this country. Whatever effect requiring those hiring illegal aliens to pay workers' compensation benefits may have to discourage the practice, it cannot be disputed that our decision confers employment benefits on illegal aliens.
>
> . . .The effect of creating an incentive for the illegal immigrant to enter or remain in this

country leads me to conclude that the contract of service in this case was illegal and does not give rise to workers' compensation benefits. Pursuant to the Immigration and Nationality Act, 8 U.S.C. 1101 et. seq., entering into the contract was illegal, the parties committed a criminal act by doing so and the contract required the alien to commit a criminal act. . .

. . .The Immigration and Nationality Act was passed to benefit not the illegal immigrant but to benefit our citizens and legal immigrants. By accepting unemployment benefits, the illegal alien deprives our citizens and legal immigrants of that employment opportunity. Moreover, the alien is the "real wrongdoer" creating the illegality by entering or remaining in the country illegally.

REASONS FOR GRANTING THE WRIT

I. THE CONNECTICUT SUPREME COURT DECISION IN *CONSIDINE* CONTRADICTS THIS COURT'S DECISION IN *SURE-TAN V. NLRB* AND SHOULD BE REVERSED

In *Sure-Tan v. NLRB*, 476 U.S. 883 (1983), this Court held (5-4) (Justice Brennan with whom Justice Marshall, Justice Blackman, and Justice Stevens joined, concurring in part and dissenting in part) that undocumented aliens who were not lawfully present in the United States and legally available for work could not be awarded back pay for a violation of the National Labor Relations Act (NLRA), 29 U.S.C. §152(3), because to do so would conflict with the immigration laws and policies of the United States.

Although this Court (7-2 with Justices Powell and Rehnquist dissenting)[2] held that an undocumented alien was an "employee" eligible to assert a claim for violations of the labor laws under the NLRA, the Court reversed the Sixth Circuit's grant of back pay to the illegal aliens because they were not legally present in the United States and available for work. This Court held that the policies of the NLRA required reconciliation with those of the Immigration and Nationality Act ("INA"), 8 U.S.C. §1101 et. seq.

This Court held with respect to the award of back pay, 476 U.S. 883, 902 (1983):

> Nonetheless, as the Court of Appeals recognized, the implementation of the [National Labor Relations] Board's traditional remedies at the compliance proceedings must be conditioned upon the employees' legal readmittance to the United States. In devising remedies for unfair labor practices, the Board is obliged to take into account another equally

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[2]Justice Powell, with whom Justice Rehnquist joined, held that the illegal aliens were not "employees" under the NLRA. They said, 467 U.S. 883, 913:

> It is unlikely that Congress intended the term "employee" to include - for purposes of being accorded the benefits of that protective statute - persons wanted by the United States for violations of our criminal laws. I therefore would hold that the illegal alien workers are not entitled to any remedy.

> important Congressional objective [citation omitted] - to wit - the objective of deterring unauthorized immigration that is embodied in the INA. By conditioning the offers of reinstatement on the employees' legal remedy, a potential conflict with the INA is avoided. Similarly, in computing back pay, the employees must be deemed unavailable for work (and the accrual of back pay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States.

This Court then continued, 467 U.S. 883, 904-905:

> We share the Court of Appeals uncertainty concerning whether any of the discharged employees will be able either to enter the country lawfully to accept the reinstatement offers or to establish at the compliance proceedings that they were lawfully available for employment during the back pay period. The probable unavailability of the Act's more effective remedies in light of the practical remedies of the immigration laws, however, simply cannot justify the judicial arrogation of remedial authority not fairly encompassed within the Act. . . . By directing the Board to impose a minimum back pay award without regard to the employees . . . legal availability for work, the Court of Appeal plainly exceed its limited authority under the Act.

Justice Brennan understood the broad scope of the

Court's prohibition against awarding back pay to illegal aliens because after approving the Court's holding that undocumented aliens are "employees" under the NLRA Justice Brennan continued, 467 U.S. 883, 911:

> But that holding is flatly contradicted by the Court's assertion in Part IV that these alien employees must be considered "unavailable" for work, and therefore not entitled to back pay under the NLRA, during any period when they were not lawfully entitled to be present in the United States.

The Connecticut Supreme Court contradicted this Court's decision in *Sure-Tan* when it held that Dowling was entitled to wages under the Connecticut WCA while remaining an undocumented alien because under the holding in *Sure-Tan* and under the IRCA she is not "legally present and available for work in the United States." Accordingly, she is not entitled to any compensation, and Slotnik, as her employer, cannot be required to make such payments while Dowling remains in that status.

II. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT AMONG THE SECOND, FOURTH, SEVENTH, NINTH AND ELEVENTH CIRCUIT COURTS OF APPEAL CONCERNING THE ELIGIBILITY OF UNDOCUMENTED ALIENS TO RECEIVE WAGES DURING TIME PERIODS WHEN THEY ARE NOT LEGALLY AVAILABLE FOR WORK UNDER THE IRCA

This Court's decision in *Sure-Tan* has generated conflicting interpretations among the Circuit Courts of

Appeal for the Second, Fourth, Seventh, Ninth and Eleventh Circuits. As the recital below demonstrates, the rights of undocumented aliens for wages while they remain illegal aliens differs from circuit to circuit.

In *Del Ray Tortilleria, Inc. v. N.L.R.B.*, 976 F.2d 1115 (7th Cir. 1992) a panel of the Seventh Circuit (Cudahy, J. dissenting) held in a pre-IRCA fact situation that undocumented aliens were not entitled to an award of back pay to redress an employer's violation of the NLRA. The Seventh Circuit stated, 976 F.2d 1115, 1122:

> Our holding, of course, applies only to discharges of undocumented aliens occurring before the enactment of IRCA. Section 274A of IRCA, 8 U.S.C. § 1324a(a) makes it unlawful for an employer to hire an undocumented alien; and thus, clearly bars the Board from awarding back pay to undocumented aliens wrongfully discharged after IRCA's enactment. *See EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1517- 18 (9th Cir. 1989 (indicating that the enactment of IRCA might "change [ ] the mix of policy considerations underlying the case laws which supports our conclusion that undocumented employees may recover back pay in a Title VII action."

The Seventh Circuit's interpretation of *Sure-Tan* and the IRCA's effect on the rights of undocumented aliens to receive wages while they are legally unavailable for work is

also supported by the Equal Employment Opportunity Commission ("EEOC"). In 1989 the EEOC issued a Policy Statement on Remedies for Undocumented Aliens, BNA Individual Employment Rights Reporter 405:6715, concerning remedies available to undocumented aliens to redress claims arising under Title VII of the Civil Rights Act of 1964. In discussing the requirement to harmonize the IRCA with the availability of remedies to an illegal alien, the EEOC stated, Id, 6722:

> "However, the Commission believes that an employer cannot be ordered by the court to pay back pay for any period of time during which an undocumented alien was discriminatorily denied work, if the employer proves that, during the period in question, it was prohibited from hiring or continuing to employ such a worker by IRCA. . . Undocumented aliens who are retaliated against for the exercise of such [Title VII] rights will be entitled to the full range of Title VII remedies, including back pay, to the extent that these do not conflict with the prohibitions contained in IRCA.

The same applies to the NLRB's view of employment requirements. See NLRB Case Handling Manual §10546.7 cited by Judge Jacobs in his dissenting opinion in *NLRB v. APRA Fuel Oil Buyers Group, Inc.*, 134 F.2d 50, 61 n. 2 (2nd Cir. 1997).

In *Egbuna v. Time-Life Libraries, Incorporated*, __ F.

3d___, 1998 WL51881 (4th Cir. 1998) (en banc 8-3) the Fourth Circuit Court of Appeals extended the logic of this Court's decision in *Sure-Tan* by holding that an undocumented alien may not assert a claim for retaliatory discharge under Section 704(a) of Title VII because as an "unauthorized alien" under Section 1324a(h)(3) of the IRCA he is not a qualified employee. While an undocumented alien Egbuna began an action against Time-Life under section 704(a) of Title VII of the Civil Rights Act seeking reinstatement and damages for retaliatory discharge, but the Fourth Circuit affirmed the District Court grant of summary judgment dismissing the case because:

> A plaintiff is entitled to the above remedies only upon a successful showing that the applicant was qualified for employment. When the applicant is an alien, being "qualified" for the position is not determined by the applicant's capacity to perform the job — rather, it is determined by whether the applicant was an alien authorized for employment in the United States at the time in questions. Congress so declared in the Immigration Reform and Control Act of 1986 ("IRCA"), which was enacted to reduce the influx of illegal immigrants into the United States by eliminating the job magnet. . . IRCA identifies unauthorized aliens as those individuals who at the particular time relating to employment are aliens neither lawfully admitted for permanent residence, nor authorized to be so

> employed by IRCA or by the Attorney General. 1998 WL51881 p.2.

Egbuna relied upon *Sure-Tan* in support of his claim that undocumented aliens are protected against discrimination in the hiring process, but the Fourth Circuit distinguished *Sure-Tan* by noting this Court's holding was limited to instances of Title VII discrimination that arose before the passage of the IRCA.

In sum, the Fourth Circuit affirmed the dismissal because to do otherwise would

> expose [Time-Life] to civil and criminal penalties and illogically create an entitlement simply because Egbuna applied for a job despite his illegal presence in this country and despite his having been statutorily disqualified from employment in the United States. 1998 WL WL51881 p.2.

Arrayed against the foregoing decisions and policy statements is a series of circuit court decisions that have limited *Sure-Tan* to situations in which the illegal alien is not physically present in the United States at the time of an award. In *N.L.R.B. v. A.R.P.A. Fuel Oil Buyers Group, Inc.* , 134 F.3d 50 (2nd Cir. 1997) (Jacobs, C.J. concurring in part, dissenting in part) the Second Circuit held that the IRCA does not prohibit an award of back pay to undocumented aliens for a period of time when the alien was physically present in the United States but legally unavailable for work. 134 F. 3d 50, 53-54.

The Second Circuit explicitly rejected the Seventh Circuits' interpretation of *Sure-Tan* as expressed in *Del Rey*. It said, 134 F. 3d 50, 58:

> The Company relies heavily on a decision of the Seventh Circuit that endorsed the Company's position while holding that Sure Tan also prevents the Board from awarding back pay to undocumented workers who were hired before the effective date of IRCA (citation omitted). We find. . .the opposition of the Seventh Circuit unpersuasive for two reasons. First, Del-Rey flatly rejected the Ninth Circuit's and this court's interpretation of *Sure-Tan*, Id. at 1119. Second, the Seventh Circuit's decision erroneously assumed that Congress had endorsed its understanding of Sure Tan when it enacted IRCA.

In A.P.R.A., the Second Circuit overcame certain reservations it expressed earlier concerning the effect of the IRCA in *Rios v. Enterprise Association Steamfitter Local Union 638 of U.A.*, 860 F.2d 1168 (2nd Cir. 1988), in which the Second Circuit held in a pre-IRCA fact pattern that undocumented aliens who remained in the United States were entitled to back pay because they were available for work under Title VII of the Civil Rights Act and, more significantly, because, 860 F. 2d 1168, 1173:

> Moreover, these claimants were available for employment during the entire period covered

> by the back pay order, since such employment would have violated no immigration law.

In *Rios*, the Second Circuit, pointed out, however, that the application of the IRCA to a similar situation might require a different result. The Second Circuit said, 860 F. 2d 1168, 1173 n. 2:

> We recognize that the law in this area has changed with the passage of the Immigration Reform and Control Act of 1986. See 8 U.S.C. §1324(a) (Supp. IV 1986) (making employment of unauthorized aliens unlawful.) We need not decide the effect of this provision on future claims such as those advanced by appellants. It is sufficient for the resolution of this case that the new provision does not apply retroactively. See 8 U.S.C. §1324(i) (Supp. IV 1986).

In *EEOC v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1988), the Ninth Circuit held in a pre-IRCA fact situation that undocumented aliens who were physically present in the United States were available for work within the meaning of *Sure-Tan* and entitled to an award of back pay under Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §2000e. The Ninth Circuit reaffirmed its reasoning in two prior decisions - *Local 512 v. National Labor Relations Board,* 795 F. 2d 705 (9th cir. 1986) (Beezer, J. dissenting) and *Bevles Co. v. Teamsters Local 986*, 791 F.2d 1391 (9th Cir. 1986), cert denied, 484 U.S. 985 (1987), but in *Hacienda* it too reserved decision about the effect of the IRCA on a post-IRCA fact

pattern involving a worker discrimination claim. The Ninth Circuit stated, 861 F. 2d 1504, 1517 n. 11:

> "We note, however, that employers who hire undocumented workers are now subject to fines and other penalties. [Citation to the IRCA omitted]. Although we need not decide the issue in this case, it may well be that this recent legislation changes the mix of policy considerations underlying the case law which supports our conclusion that undocumented employees may recover back pay in a Title VII action. See Local 512, 795 F. 2d at 717-22."

Lastly, in *Patel v. Quality Inn South*, 846 F. 2d 700 (11th Cir. 1988) cert denied 489 U.S. 1011 (1988) the Eleventh Circuit held that an undocumented alien may receive back pay under the Fair Labor Standards Act of 1938 ("FSLA"), 29 U.S.C.A. §§ 201-219. In *Patel*, the Eleventh Circuit refused to endorse the Ninth Circuit's interpretation of *Sure-Tan* as limited to illegal aliens who are located outside the United States. The Eleventh Circuit observed, 846 F. 2d 700, 705 n.6:

> In *[Felbro]* the Ninth Circuit narrowly interpreted *Sure-Tan*. . .Sure Tan did not, the panel concluded, intend to foreclose awards of back pay under the NLRB to those aliens who remain in the United States. . . The question of the availability of back pay under the NLRB is not before us, and we express no

opinion on the Ninth Circuit's interpretation of *Sure-Tan*.

In *Patel* the Eleventh Circuit also distinguished its factual situation from *Felbro* by stating that in the context of a back pay award for work already performed by the undocumented alien, it makes no sense to assert that the alien was "unavailable for work during a period of time he was actually working."

III. THE COURT SHOULD GRANT CERTIORARI TO HARMONIZE THE DISPARATE TREATMENT OF UNDOCUMENTED ALIENS IN DIFFERENT JURISDICTIONS AND TO EFFECTUATE THE IMMIGRATION POLICIES OF THE UNITED STATES AS EXPRESSED BY CONGRESS

Based on the foregoing review the entitlement of undocumented aliens to compensation for periods of time in which they are not lawfully present in the United States and legally unavailable for work is in disharmony. The Second Circuit has held an award of back pay to undocumented aliens is permitted under the NLRA for a post IRCA work violation. In reliance thereon the Connecticut Supreme Court made the same determination for the Connecticut WCA in petitioners' case.

At the other extreme, the Fourth Circuit in a Title VII proceeding under the Civil Rights Act has declared undocumented aliens are not employees entitled to assert a claim because of their illegal status under the IRCA. A fortiori they are not entitled to wages or other remedies as relief when they are not legally present in the United States or available for work. Similarly, the Seventh Circuit held

under the NLRA for pre and post IRCA fact situations that an undocumented alien is not entitled to wages for statutory violations committed against the alien during a time period when the undocumented alien is not lawfully present in the United States or legally available to work. The EEOC agrees with the Seventh Circuit in its attempt to harmonize the policies of the labor statutes of the United States with the requirements of the IRCA.

Lastly, although the Ninth Circuit and the Eleventh Circuit have permitted awards of back pay under the NLRA and FLSA, both circuits expressly reserved the question whether they would reach the same conclusion when a post IRCA fact pattern is presented to them for decision.

Thus, as matters now stand, an undocumented alien has one set of rights and remedies in the Second Circuit, a different set of remedies in the Seventh Circuit and fewer rights and remedies in the Fourth Circuit. The post IRCA outcome of a claim asserted by an undocumented alien in the Ninth and Eleventh Circuit remains in doubt.

Congress has continued to emphasize the nation's concern with the problems of undocumented aliens. Through a variety of legislation Congress remains intent on removing or restricting the continued inducement wages and other benefits offered to undocumented aliens and to increase the implementation of the IRCA as an enforcement weapon against them. By way of example, in 1996 Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 8 U.S.C. §1601-1646, the purpose of which Congress announced in 8 U.S.C. §1601(6) as:

> "It is a compelling government interest to remove the incentive for illegal immigration provided by availability of public benefits."

Congress then defined "Federal public benefits" as

> "any retirement, welfare, health, disability, public or assisted housing, post-secondary education, food assistance, unemployment benefit, or any other similar benefit for which payment or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States."

and stated that an alien who is not a qualified alien is not eligible for any Federal public benefit. In 8 U.S.C. §1621 Congress made non-qualified aliens ineligible for any state or local public benefit which are defined in the same manner as a Federal public benefit. 8 U.S.C. §1621(a). With some exceptions not relevant here, Congress defined a "qualified alien" as someone "lawfully admitted for permanent residence in the United States" under the Immigration and Nationality Act. 8 U.S.C. §1641 (b).

Congress also has approached additional regulation of illegal aliens through passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, P.L. 104-208, 110 Stat. 3009-546, which, among other things, includes amendments to the IRCA that impose additional civil and criminal penalties upon undocumented aliens for violations of the IRCA.

In all, this Court should set a bright line standard in which the compensation rights of undocumented aliens for situations in which they are not lawfully present in the United States and not legally available for work is predictable and uniform throughout. This standard should apply regardless of the form the wages assume, whether it be labor law, workers' compensation or some other form of wage related benefit.

Conclusion

For the foregoing reasons, this Court should grant the petition for a writ of certiorari, and either summarily reverse the decision below or set the case for plenary review.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF THE STATE OF CONNECTICUT DECIDED MAY 26, 1998

CONNECTICUT SUPREME COURT
Victoria Dowling Considine,
Claimant-Respondent

v.

Sol Slotnik and Diane Reverand,
Employer-Appellants

and

The Second Injury Fund

Argued January 16 — officially released May 26, 1998
(PROCEDURAL HISTORY)

Appeal from a decision by the workers' compensation commissioner for the fourth district ordering, inter alia, that the named respondent et al. pay workers' compensation benefits to the claimant, brought to the compensation review board, which affirmed the commissioner's decision, and the named respondent et al. appealed - *Affirmed in part; reversed in part, further proceedings* -

Sol V. Slotnik, pro se, and, on the brief, *Diane Reverand* pro se, the appellants (named respondent et al.).

Brendan P. Leydon, for the appellee (claimant) -

(OPINION)

CALLAHAN, C. J. The principal issue in this appeal is whether a claim for a work-related injury by the claimant, an illegal alien, is within the jurisdictional confines of the Workers' Compensation Act, General Statutes § 31-275 et seq. We conclude that it is.

The following facts and procedural history are uncontroverted. On February 14, 1994, the respondents, Sol V. Slotnik and Diane Reverand,[1] who are husband and wife, hired the claimant, Victoria Dowling, as a live-in housekeeper and nanny for their two sons. At that time, the claimant informed the respondents that she was an illegal alien. She also exaggerated her prior work experience on her application for employment. In return for her services, the respondents agreed to pay the claimant a gross weekly salary of $400 and provide her with health insurance, room and board, use of an automobile and an allowance toward the cost of a private telephone. The respondents did not obtain workers' compensation insurance coverage for the claimant, as required by General Statutes (Rev. to 1993) § 31-284[2], or

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[1]The second injury fund was named as a respondent in the proceedings before the workers' compensation commissioner but did not participate in this appeal. References to the respondents are to Slotnick and Reverand.

[2]General Statutes (Rev. to 1993) § 31-284 (a) provides in relevant part: "An employer shall not be liable to any action for damages on account of personal injury sustained by an employee arising out of and in the course of his employment . . - but an employer shall secure compensation for his employees as provided under this chapter. . . Section 31-284 (a) was revised in 1996. We refer herein to the statute as revised to 1993.

provide the agreed upon health insurance coverage.

On February 28, 1994, while going to the respondents' mailbox, which was located at the end of their driveway, the claimant slipped and fell on ice that had accumulated in the driveway, seriously injuring her right arm and hand. The claimant thereafter brought a timely claim for workers' compensation benefits.[3] The workers' compensation commissioner for the fourth district (commissioner) determined that, despite her status as an illegal alien, the claimant was an "employee" as defined by General Statutes §31-275 (9)[4] and that her claim consequently was within the jurisdiction of the workers' compensation commission (commission). The commissioner found that the fall had

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[3]See General Statutes §5 31-294c.

[4]General Statutes § 31-275 (9) (A) provides in relevant part: "'Employee' means any person who:

"(i) Has entered into or works under any contract of service with an employer . . . . . "

General Statutes § 31-275 (9) (B) provides in relevant part: "'Employee' shall not be construed to include:

"(i) Any person to whom articles . . . are given to be treated . . . on premises not under the control of the person who gave them out;

"(ii)One whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business;

"(iii) A member of the employer's family dwelling in his house. . . .

"(iv) Any person engaged in any type of service in or about a private dwelling provided he is not regularly employed by the owner or occupier over twenty-six hours per week;

"(v) An employee of a corporation who is a corporate officer and who elects to be excluded . . . or

" (vi) Any person who is not a resident of this state but is injured in this state during the course of his employment, unless. . . "

caused the claimant to suffer right brachial plexopathy and reflex sympathetic dystrophy as well as right ulnar neuropathy. The commissioner found that the claimant's injuries had arisen out of and during the course of her employment and, therefore, were compensable pursuant to § 31-284 (a). The commissioner further found that those injuries had caused the claimant to be totally disabled between June 24, 1994, and August 30, 1995, and that the compensation rate applicable to her claim was $325.25 per week[5]. The commissioner ordered the respondents to pay: (1) $20,125.22 in disability benefits for the period from June 24, 1994, through August 30, 1995; (2) disability benefits for the period from August 31, 1995, forward, subject to further medical documentation of the claimant's disability; (3) interest on past due disability benefits at the rate of 12 percent per annum and the claimant's attorney's fee[6]; (4) a $10,000 fine to the second injury fund for failing to secure compensation coverage for the claimant as required by § 31-

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[5] General Statutes § 31-307 (a) provides in relevant part: "If any injury for which compensation is provided under the provisions of this chapter results in total incapacity to work, the injured employee shall be paid a weekly compensation equal to seventy-five per cent of his average weekly earnings as of the date of the injury . . . but the compensation shall not be more than the maximum weekly benefit rate . . . for the year in which the injury occurred. No employee entitled to compensation under this section shall receive less than twenty per cent of the maximum weekly compensation rate . . . provided the minimum payment shall not exceed seventy-five per cent of the employee's average weekly wage. . .and the compensation shall not continue longer than the period of total incapacity."

[6]General Statutes § 31-300 provides in relevant part; "In cases where, through the fault or neglect of the employer . . . payments have been unduly delayed, the commissioner may include in his award..... interest at twelve per cent per annum and a reasonable attorney's fee.

284;[7] (5) any reasonable medical expenses incurred by the claimant as a result of the fall[8] and (6) the claimant's testimonial expenses.[9] The respondents appealed from the order of the commissioner to the compensation review board (board) pursuant to General Statutes § 31-301.[10] The board affirmed the commissioner's order. Acting pro se, Slotnik appealed from the decision of the board to the Appellate Court pursuant to General Statutes § 31-301b.[11] The claimant subsequently filed a motion in the Appellate Court seeking dismissal of Reverand appeal for her failure to file property. The Appellate Court issued an order granting the claimant's motion to dismiss Reverand's appeal unless a corrected appeal was filed on or before May 29, 1997. On May 28, 1997, both respondents, acting pro se, filed a corrected

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[7] General Statutes (Rev. to 1995) § 31-288 (c) provides in relevant part: "Whenever the commissioner finds that the employer is not in compliance with said requirements he may assess a civil penalty of not more than ten thousand dollars against the employer."

[8]See General Statutes §31-294d.

[9]See General Statutes §31-298.

[10]General Statutes § 31-301 (a) provides in relevant part: "At any time within ten days after entry of an award by the commissioner, after a decision of the commissioner upon a motion or after an order by the commissioner according to the provisions of section 31-299b, either party may appeal therefrom to the Compensation Review Board by filing in the office of the commissioner from which the award or the decision on a motion originated an appeal petition and five copies thereof. . .

[11]General Statutes §31-301b provides: Any party aggrieved by the decision of the Compensation Review Board upon any question or questions of law arising in the proceedings may appeal the decision of the Compensation Review Board to the Appellate Court."

appeal. We transferred the corrected appeal to this court pursuant to Practice Book § 4023, now Practice Book (1998 Rev.) § 65-1, and General Statutes § 5-199 (c).

On appeal, the respondents claim that the commissioner improperly determined that the claimant had sustained a compensable injury. Specifically, the respondents argue that: (1) the commission's authority was preempted, under the circumstances of this case, by the federal Immigration Reform and Control Act of 1986;[12] (2) the commission lacked jurisdiction over the claimant's claim because illegal aliens are not included in the group of "persons" eligible for workers' compensation benefits; (3) the commission lacked jurisdiction over the claimant's claim because the employment agreement between the claimant and the respondents, having been tainted by the illegality of the claimant's immigration status, does not constitute a "contract of service," and, consequently, the claimant is not an "employee" as defined in § 31-275 (9) ; (4) the commission lacked jurisdiction over the claimant's claim because the employment agreement between the claimant and the respondents was invalidated by misrepresentations the claimant made in her employment application and, therefore, does not constitute the requisite "contract of service, " and, consequently, the claimant is not an "employee" as defined in § 31-275 (9); and (5) the commissioner's order is violative of the respondents' due process and equal protection rights under the United States and Connecticut constitutions. The respondents further claim that the commissioner abused his discretion by ordering the respondents to pay a $10,000 fine

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[12]The Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986), amended the Immigration and Nationality Act, which is codified as amended at 8 U.S.C. §1101 et. seq.

to the second injury fund for failing to procure workers' compensation coverage for the claimant.

I

Before reviewing the merits of the respondents' claims, we address a challenge raised in the claimant's brief to our jurisdiction over Reverand's appeal. The claimant argues that Reverand's appeal is not properly before this court because the Appellate Court lacked authority to permit the respondents to file a corrected appeal. In effect, the claimant contends that the Appellate Court lacked authority to allow Reverand to file a late appeal. We disagree.

"We note at the onset that a claim that this court lacks subject matter jurisdiction [may be raised] at any time. Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it. . . . The objection of want of [subject matter] jurisdiction may be made at any time . . . and the court or tribunal may act on its own motion, and should do so when the lack of jurisdiction is called to its attention. . . . The requirement of subject matter jurisdiction cannot be waived by any party and can be raised at any stage in the proceedings . . . . If at any point, it becomes apparent to the court that such jurisdiction is lacking, the appeal must be dismissed." (Internal quotation marks omitted.) *State v. Anonymous,* 240 Conn. 708, 718, 694 A.2d 766 (1997); see *Lewis v. Gaming Policy Board,* 224 Conn. 693, 698 99, 620 A.2d 780 (1993); *Statewide Grievance Committee v. Rozbicki,* 211 Conn. 232, 245, 558 A.2d 986 (1989); *State v. Malkowski,* 189 Conn. 101, 104, 454 A.2d 275 (1983) .

Section 31-301b authorizes a party aggrieved by a

final decision of the board to appeal from the board's decision to the Appellate Court. See *Cleveland v. U.S. Printing Ink, Inc.*, 218 Conn. 181, 184-85, 588 A.2d 194 (1991). Practice Book § 4165, now Practice Book (1998 Rev.) § 76-1, provides in relevant part that, "the practice and procedure for appeals to the appellate court (1) from a decision of the compensation review board . . . shall conform to the rules of practice governing other appeals." Practice Book § 4009 (a), now Practice Book (1998 Rev.) § 63-1 (a), provides in relevant part that "a party shall have twenty days from the [date notice is given of the board's decision]. . . to file an appeal. . .," It is undisputed that Reverand's appeal was not filed properly until after the twenty day limit established by §4009 (a) had expired. The twenty day time limitation established by § 4009 (a), however, is not a "constitutionally or legislatively created condition precedent to the jurisdiction of [the appellate] court.'" *Ambroise v. William Raveis Real Estate, Inc.*, 226 Conn. 757, 763, 628 A.2d 1303 (1993); See *Killey v. Bonney*, 221 Conn. 549, 558- 59, 606 A.2d 693 (1992); *Connelly v. Doe*, 213 Conn. 66, 69-70 n.5, 566 A.2d 426 (1989). Furthermore, Practice Book § 4183, now Practice Book (1998 Rev.) § 60-2, explicitly provides that "the court having appellate jurisdiction from the time the appeal is filed, or earlier . . . may, on its own motion . . . (6) order that a party for good cause shown may file a late appeal . . . " We eschew "mechanistic interpretations of our appellate rules in recognition of the fact that an unyielding policy requiring strict adherence to an appellate limitation period -- no matter how severe or unfair the consequences -- does not serve the interests of justice."*Banks v. Thomas*, 241 Conn. 569, 586, 698 A.2d 268 (1997). Practice Book § 4183 (6) vested the Appellate Court with authority to permit Reverand to pursue a late appeal, and, consequently, her appeal is properly before this court.

II

We turn now to the respondents' substantive claims. We note that ordinarily we would not address the respondents' claim that the commission's authority to award workers' compensation benefits to the claimant was preempted by the federal Immigration Reform and Control Act of 1986 (Immigration Reform Act) until after the respondents' remaining jurisdictional claims had been resolved, because if the commission lacked jurisdiction over the claimant's claim for benefits, we would not need to consider the respondents' federal preemption claim. Because, however, the respondents' jurisdictional claims are inextricably intertwined with the Immigration Reform Act, we depart, for purposes of clarity, from our usual practice and first discuss the respondents' preemption claim.

We begin with a brief overview of the purpose and relevant provisions of the Immigration Reform Act. "The [Immigration Reform Act] constituted a major . . . response to the vast tide of illegal immigration that had produced a 'shadow population' of literally millions of undocumented aliens in the United States." *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 481, 1ll S. Ct. 888, 112 L. Ed. 2d 1005 (1991); see *Etuk v. Slattery*, 936 F.2d 1433, 1437 (2d Cir. 1991). The Immigration Reform Act sought to reduce the flow of illegal immigration into the United States by removing the employment "magnet" that draws undocumented aliens into the country. *Montero v. Immigration & Naturalization* Service, 124 F. 3d 381, 384 (2d Cir. 1997); see H.R. Rep. No. 99-682(I), 99th Cong., 2d Sess. 45-46, 56 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5649-50, 5660. The goal of the Immigration Reform Act was "to reduce the incentives for employers to hire illegal aliens."

National Labor Relations Board v. A.P.R.A. Fuel Oil Buyers Group, Inc., 134 F.d 50, 55 (2d Cir. 1997); see *Patel v. Quality Inn South*, 846 F.2d 700, 704 (11th Cir. 1988), cert. denied, 489 U.S. 1011, 109 S. Ct. 1120, 103 L. Ed. 2d 182 (1989) (Immigration Reform Act was designed to eliminate economic incentive to hire undocumented aliens); accord *Equal Employment Opportunity Commission* v. *Tortilleria "La Mejor,"* 758 F. Supp. 585, 591 (E.D. Cal. 1991).

Consistent with these goals, the Immigration Reform Act makes it unlawful knowingly to employ unauthorized workers. 8 U.S.C. § 1324 (a). Employers are required to verify that each of their employees is authorized to work in the United States and to complete an employment eligibility verification form, attesting that the employer has examined certain types of documents and has verified that the potential employee is not an unauthorized alien. 8 U.S. C. §1324a (b). Civil fines may be imposed on an employer who violates the verification requirements or knowingly employs an unauthorized alien. 8 U.S.C. §1324a (e) (4) and (5). A pattern or practice of knowingly employing unauthorized aliens may result in the infliction of criminal punishment. 8 U.S.C. §1324a(f). In addition, the Immigration Reform Act provides that "[t]he provisions of [§1324a] preempt any State or local law imposing civil or criminal sanctions. . . upon those who employ. . . unauthorized aliens." (Emphasis added.) 8 U.S.C. §1324a (h) (2).

"The question of preemption is one of federal law, arising under the supremacy clause of the United States constitution. . . Determining whether Congress has exercised its power to preempt state law is a question of legislative intent." (Citation omitted.) *Serrano v. Serrano*, 213 Conn. 1, 5, 566 A. 2d 413 (1989); see *Northwest Central Pipeline*

Corp. v. State Corp. Commission of Kansas, 489 U.S. 493, 509, 109 S. Ct. 1262, 103 L. Ed. 2d 509 (1989). Preemption may be express or implied. *Assn. of International Automobile Manufacturers, Inc. v. Abrams*, 84 F.3d 602, 607 (2d Cir. 1996). "Express preemption occurs to the extent that a federal statute expressly directs that state law be ousted to some degree from a certain field. . . . Even where there is no express statutory statement ousting state law from a given area, [however] there may be implied preemption." Id. "The United States Supreme Court has instructed us that, absent an explicit statement that Congress intends to preempt state law, courts should infer such intent where Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947), or where the state law at issue conflicts with federal law, either because it is impossible to comply with both, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, 83 S. Ct. 1210, 1217-18, 10 L. Ed. 2d. 248 [reh. denied, 374 U.S. 858, 83 S. Ct. 1861, 10 L. Ed. 2d 1082] (1963), or because the state law stands as an obstacle to the accomplishment and execution of congressional objectives, *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 404, 85 L. Ed. 581 (1941)." (Internal quotation marks omitted.) *Serrano v. Serrano*, supra, 6; see *Northwest Central Pipeline Corp. v. State Corp. Commission of Kansas*, supra, 509.

The respondents make two arguments in support of their claim that the Immigration Reform Act preempted the commissioner from awarding workers' compensation benefits to the claimant. They argue that to the extent that a workers' compensation award requires an employer to make payments to an undocumented alien, the award constitutes a civil

sanction against the employer that is expressly preempted by 8 U.S.C. § 1324a (h) (2), the preemption provision of the Immigration Reform Act, and, in the alternative, that such an award impliedly is preempted by the Immigration Reform Act because providing workers' compensation benefits to an undocumented alien contravenes the purpose of the Immigration Reform Act. We disagree with both claims.

A

We turn first to the respondents' claim that the Immigration Reform Act expressly preempts the commissioner from awarding workers' compensation benefits to undocumented aliens. Section 1324a (h) (2), the express preemption provision of the Immigration Reform Act, only prohibits the states from imposing civil *sanctions* upon those who employ undocumented aliens. Because workers' compensation benefits are designed " 'to *compensate the worker for injuries* arising out of and in the course of employment, without *regard to fault,* by imposing a form of strict liability on the employer"'; (emphasis added) *Panaro v. Electrolux Corp.* , 208 Conn. 589, 598-99, 545 A.2d 1086 (1988); *Jett v. Dunlap,* 179 Conn. 215, 217, 425 A.2d 1263 (1979); an award of such benefits reasonably cannot be described as a "sanction."

Moreover, even if we assume, arguendo that workers' compensation benefits somehow do constitute a "sanction" rather than a compensatory remedy, the respondents' argument that § 1324a (h) (2) proscribes awards of workers' compensation benefits to illegal aliens is still unpersuasive. Section 1324a (h) (2) does not preempt the states from imposing any civil sanction *whatsoever* upon a person who employs an undocumented alien. Rather, the Immigration

Reform Act expressly preempts the states from sanctioning an employer only *for employing an undocumented alien.* To construe the express preemption provision of the Immigration Reform Act otherwise would result in state and local officials being unable to impose even a traffic fine upon a person who has employed an undocumented alien, an obviously absurd result. Accordingly, in order for an award of compensation benefits to an undocumented alien to fall within the purview of § 1324a (h) (2), the benefits must have been awarded *because the employee was an illegal alien.* The respondents, however, do not contend that the legislature intended that an award of workers' compensation benefits serve as a means of penalizing employers *for employing undocumented aliens,* nor do they claim that the commissioner awarded benefits to the claimant in order to sanction the respondents *for hiring the claimant,* and nothing in the record even suggests that was the case. We conclude, therefore, that the commissioner's award of workers' compensation benefits to the claimant does not constitute a civil sanction that is preempted by § 1324a (h) , the express preemption provision of the Immigration Reform Act.

B

The respondents also maintain that to the extent that the Workers' Compensation Act authorizes the commissioner to award benefits to undocumented aliens, the Workers' Compensation Act *impliedly* is preempted by the Immigration Reform Act.[13] [A] federal statute implicitly

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[13]The inclusion in a federal statute of an express provision regarding preemption does not necessarily foreclose the possibility that aspects of a state law not expressly within the federal preemption provision may be preempted by implication. *Freightline-Corp. v. Myrick,*

overrides state law either when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively . . . or when state law is in actual conflict with federal law. [The United States Supreme Court has] found implied conflict preemption where it is impossible for a private party to comply with both state and federal requirements . . . or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (Citations omitted; internal quotation marks omitted.) *Freightliner Corp. v. Myrick,* 514 U.S. 280, 287, 115 S. Ct. 1483, 131 L. Ed. 2d 385 (1995); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248, 104 S. Ct. 615, 78 L. Ed. 2d 443 (1984); *Kenny v. Kenny,* 226 Conn. 219, 224, 627 A. 2d 426 (1993) ; *Times Mirror Co. v. Division of Public Utility Control,* 192 Conn. 506, 510-11, 473 A.2d 768 (1984). The respondents do not claim that the Immigration Reform Act was intended to "occupy [the] field" or that it is impossible for employers to comply with the requirements of both the Immigration Reform Act and the Workers' Compensation Act, but argue instead that providing workers' compensation benefits to an undocumented alien would contravene the purpose of the Immigration Reform Act. "(T)here is a strong presumption against federal preemption of state and local legislation" *Richmond Boro Gun Club, Inc. v. New York,* 97 F.3d 681, 687 (2d Cir. 1996); see *California v. ARC America Corp.* , 490 U.S. 93, 101, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989). This presumption is especially strong in areas traditionally occupied by the states, such as public health and safety. *Richmond Boro Gun Club, Inc. v. New York,* supra, 687; see *English v. General Electric*

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514 U.S. 280, 287- 88, 115 S. Ct. 1483, 131 L. Ed. 2d 385 (1995); *Assn. of International Automobile Manufacturers, Inc. v. Abrams,* supra, 84 F.3d 607.

Co., 496 U.S. 72, 79, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990) . Consideration of issues arising under the supremacy clause "It start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the *clear and manifest* purpose of Congress." (Emphasis added.) *Medtronic, Inc. v. Lohr*, _ U.S. _, 116 S. Ct. 2240, 2250, 135 L. Ed. 2d 700 (1996); *New York State Conference of Blue Cross &Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655, 115 S. Ct. 1671, 131 L. Ed. 2d 695 (1995); *Rice v. Santa Fe Elevator Corp.*, supra, 331 U.S 230.

The primary purpose of the Immigration Reform Act was to establish procedures that make it more difficult to employ undocumented workers and to punish employers who knowingly offer jobs to those workers. *National Labor Relations Board v. A.P.R.A. Fuel Oil Buyers Group, Inc.* , supra, 134 F. 3d 55 56; see *United States v. Todd Corp.* , 900 F.2d 164, 165 (9th Cir. 1990). The Immigration Reform Act itself gives no indication that Congress intended the act to preempt state laws whenever state laws operate to benefit undocumented aliens. Indeed, "it is clear from [the] legislative history [of the Immigration Reform Act] that Congress anticipated some conflict between the new statute and . . . various state . . . statutes. . . As explained in the House Report: 'It is not the intention of the Committee that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections in existing law . . . . ' "*Montero v. Immigration & Naturalization Service,* supra, 124 F.3d 384; see H.R. Rep. No. 99-682(l), p. 58 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5662." [I]n an effort not to exacerbate the appeal of illegal workers to unscrupulous employers, [the Immigration Reform Act]. . . does not reduce the legal protections and *remedies* for

undocumented workers under other laws." (Emphasis added.) *National Labor Relations Board v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, supra, 56.

Furthermore, there is no merit to the respondents' argument that providing workers' compensation benefits to undocumented aliens would stand as an obstacle to "removing the employment 'magnet "that draws undocumented aliens into the country." *Montero* v. *Immigration & Naturalization Service,* supra, 124 F.3d 384. Potential eligibility for workers' compensation benefits in the event of a work-related injury realistically cannot be described as an incentive for undocumented aliens to enter this country illegally. See *Patel v. Quality Inn South,* supra, 846 F.2d 704 (procurement of employment at any wage, not prospect of job related protections, attracts illegal immigrants). More important, excluding such workers from the pool of eligible employees would relieve employers from the obligation of obtaining workers' compensation coverage for such employees and thereby contravene the purpose of the Immigration Reform Act by creating a financial incentive for unscrupulous employers to hire undocumented workers. See Conn. Joint Standing Committee Hearings, Judiciary, 1913 Sess. , p. 124, remarks of Professor Willard C. Fisher ("[u]nless the employer is required to pay the same (insurance premium for all workers). . .he is . . . under inducement to take on [uncovered workers] . . . [the Workers' Compensation Act] must not. . . exclude aliens from the benefits; because there would be precisely the same inducement under such a provision for an employer to take on the men who are not citizens of the country") ; *Mendoza v. Monmouth Recycling Corp.*, 288 N.J. Super. 240, 247, 672 A.2d 221 (1996) ("immunity from accountability [under Workers' Compensation Act] might well have the further

undesirable effect of encouraging employers to hire illegal aliens in contravention of the provisions and policies (of the Immigration Reform Act]"; *Montoya v. Gateway Ins.Co.*, 168 N.J. Super. 100, 104, 401 A.2d 1102 (1979) (potential employers may be encouraged to employ illegal aliens if such aliens are unable to lodge claims based on injuries sustained) ; see also *Sure-Tan, Inc. v. National Labor Relations Board,* 467 U.S. 883, 893, 104 S. Ct. 2803, 81 L. Ed. 2d 732 (1984) (excluding illegal aliens from purview of National Labor Relations Act would provide incentive for employers to hire such workers); *Patel v. Quality Inn South*, supra, 846 F.2d 704 (excluding illegal aliens from purview of Fair Labor Standards Act would provide incentive for employers to hire such workers).

The respondents have failed to establish that Congress intended the Immigration Reform Act to preempt state laws that benefit undocumented aliens, nor have they demonstrated that including undocumented aliens in the pool of employees potentially eligible to receive state workers' compensation benefits would result in "clear and manifest" damage; *Medtronic, Inc. v. Lohr,* supra, 116 *S.* Ct. 2250; to the goal Congress sought to attain when it enacted the Immigration Reform Act. We conclude, therefore, that the Immigration Reform Act does not preempt, either expressly or impliedly, the authority of the states to award workers' compensation benefits to undocumented aliens.

III

We begin our analysis of the respondents' jurisdictional claims by setting forth the standard of review applicable to workers' compensation appeals. "The principles that govern our standard of review in workers' compensation appeals are

well established. 'The conclusions drawn by [the commissioner] from the facts found must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them'. . . . *Casade v. Interstate Security Services,* 212 Conn. 441, 449, 562 A.2d 1086 (1989). Neither the review board nor this court has the power to retry the facts. See *Six v. Thomas O'Connor & Co.,* 235 Conn. 790, 798-99, 669 A.2d 1214 (1996)." *Doe v. Stamford,* 241 Conn. 692, 696-97, 699 A.2d 52 (1997). 'It is well established that although not dispositive, we accord great weight to the construction given to the workers' compensation statutes by the commissioner and review board . . . . A state agency is not entitled, however, to special deference when its determination of a question of law has not previously been subject to judicial scrutiny. " (Internal quotation marks omitted.) *Duni* v. *United Technologies Corp./Pratt & Whitney Aircraft Division,* 239 Conn. 19, 24-25, 682 A.2d 99 (1996); *Davis v. Norwich,* 232 Conn. 311, 317, 654 A.2d 1221 (1995). "Where. . . [a workers' compensation] appeal involves an issue of statutory construction that has not yet been subjected to judicial scrutiny, this court has plenary power to review the administrative decision." *Doe v. Stamford,* supra, 697; see *Davis v. Norwich,* supra, 317.

In determining that the claimant's claim for workers' compensation benefits was within the jurisdiction of the commission, the commissioner relied on the board's determination in *Tavares v. Noel*, 15 Conn. Workers' Comp. Rev. Op. 172, 174 (1996), that illegal aliens are included in the group of persons eligible for workers' compensation benefits. The claimant maintains that we must accord great deference to the board's determination in *Tavares* that illegal

aliens are eligible for workers' compensation benefits. Neither that issue nor any of the other issues raised in the respondents' jurisdictional challenges, however, has been subjected previously to judicial scrutiny, and, consequently, our review of the respondents' jurisdictional claims is plenary.

A brief overview of the purpose, relevant provisions and relevant jurisdictional confines of the Workers' Compensation Act is necessary to a resolution of the respondents' jurisdictional claims. "'The purpose of the workmen's compensation statute is to compensate the worker for injuries arising out of and in the course of employment, without regard to fault, by imposing a form of strict liability on the employer'" *Panaro v. Electrolux Corp.*, supra, 208 Conn. 598-99; *Jett v. Dunlap*, supra, 179 Conn. 217. The Workers' Compensation Act '"Compromise[s] an employee's right to a common law tort action for work related injuries in return for relatively quick and certain compensation.'" *Panaro v. Electrolux Corp.*, supra, 599; see *Hunnihan v. Mattatuck Mfg. Co.*, 243 Conn. 438, 446, 705 A. 2d 1012 (1997) ; *Dodd v. Middlesex Mutual Assurance Co.*, 242 Conn. 375, 381, 698 A.2d 859 (1997); *Mingachos v. CBS, Inc.*, 196 Conn. 91, 97, 491 A.2d 368 (1985).

"We have previously observed that the workers' compensation commission, like any administrative body, must act strictly within its statutory authority . . . It cannot modify, abridge, or otherwise change the statutory provisions under which it acquires authority unless the statutes expressly grant it that power." (Internal quotation marks omitted.) *Discuillo v. Stone & Webster*, 242 Conn. 570, 576, 698 A.2d 873 (1997) ; see *Figueroa v. C & S Ball Bearing*, 237 Conn. 1, 4, 675 A.2d 845 (1996); *Castro v. Viera*, 207 Conn. 420,

428, 541 A.2d 1216 (1988). "A commissioner may exercise jurisdiction to hear a claim only under the precise circumstances and in the manner particularly prescribed by the enabling legislation.'" *Discuillo v. Stone & Webster,* supra, 576; *Heiser v. Morgan Guaranty Trust Co.,* 150 Conn. 563, 565, 192 A.2d 44 (1963). "[I]t is settled law that the commissioner's jurisdiction is confined by the [Workers' Compensation Act] and limited by its provisions." (Internal quotation marks omitted.)'" *Discuillo v. Stone & Webster*, supra, 576; *Gagnon v. United Aircraft Corp.,* 159 Conn. 302, 305, 268 A.2d 660 (1970). "The commissioner exercises jurisdiction only under the precise circumstances and in the manner particularly prescribed by the enabling legislation." (Internal quotation marks omitted.) *Kinney v. State*, 213 Conn. 54, 60, 566 A.2d 670 (1989) *; Heiser v. Morgan Guaranty Trust Co.,* supra, 565; *Castro v. Viera,* supra, 427-28. "The parties cannot confer jurisdiction upon the commissioner by agreement, waiver or conduct." *Kinney v. State,* supra, 60; *Castro v. Viera*, supra, 429-3 0 . "The [Workers' Compensation Act] is not triggered by a claimant until he brings himself within its statutory ambit." (Internal quotation marks omitted.) *Kinney v. State*, supra, 59; *Castro v. Viera,* supra, 433. "Although the Workers' Compensation Act should be broadly construed to accomplish its humanitarian purpose,; *Adzima v. UAC/Norden Division,* 177 Conn. 107, 117, 411 A.2d 924 (1979); *Perille v. Raybestos-Manhattan-Europe, Inc.,* 196 Conn. 529, 541, 494 A.2d 555 (1985); its remedial purpose cannot transcend its statutorily defined jurisdictional boundaries.,' *Kinney v. State*, supra, 58-59; *Castro v. Viera*, supra, 145.

"The entire statutory scheme of the Workers' Compensation Act is directed toward those who are in the employer-employee relationship as those terms are defined in

the act and discussed in our cases. That relationship is threshold to the rights and benefits under the act; a claimant . . . who is not an employee has no right under this statute to claim for and be awarded benefits." (Internal quotation marks omitted.) *Vanzant v. Hall,* 219 Conn. 674, 678, 594 A. 2d 967 (1991); *Castro v. Viera,* supra, 207 Conn. 433. "[A claimant] may invoke the remedy provided under the Workers' Compensation Act only if [the claimant], as a matter of law, satisfies the requisite jurisdictional standard of 'employee' as defined by the legislature in [§ 31-275 (9)]." *Kinney* v. *State*, supra, 213 Conn. 60.

The respondents maintain that, as a matter of law, the claimant does not meet the jurisdictional standard of being an "employee" as defined in § 31-275 (9) because: (1) illegal aliens are not included in the group of "persons" eligible, by virtue of the definition of "employee" in § 31-275 (9) (A) (i), to invoke the remedy provided by the Workers' Compensation Act; (2) the employment agreement between the claimant and the respondents, having been tainted by the claimant's immigration status, does not constitute a "contract of service" as is required under § 31-275 (9)(A) (i) to establish the employer-employee relationship; and (3)the employment agreement between the claimant and the respondents, having been invalidated by misrepresentations the claimant made on her employment application, does not constitute the "contract of service" required by § 31-275 (9) (A) (i) to establish the employer-employee relationship. We disagree with all three claims.

A

The respondents first maintain that illegal aliens are not included in the group of "persons" who, by virtue of the definition of "employee" under § 31-275 (9) (A) (i) , are

eligible for workers' compensation benefits. The respondents have called our attention to the public policy implications of this issue, but the question is really a matter of statutory construction. In interpreting statutes, we are guided by "well established tenets [of statutory construction] . . . [O]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . In seeking to discern that intent, we look to the words of the statute itself, to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter." (Internal quotation marks omitted.) *Gil v. Courthouse One,* 239 Conn. 676, 662, 687 A.2d 146 (1997); see *Metropolitan District Commission v. AFSCME, Council 4, Local 184,* 237 Conn. 114, 120, 676 A.2d 825 (1996); *M. DeMatteo Construction Co. v. New London,* 236 Conn. 710, 714 15, 674 A.2d 845 (1996); *State v. Burns,* 236 Conn. 18, 22 23, 670 A.2d 851 (1996); *State v. Spears,* 234 Conn. 78, 86-87, 662 A.2d 80, cert. denied, 516 U.S. 1009, 116 S. Ct. 565, 133 L. Ed. 2d 490 (1995).

Our analysis begins with the language of § 31-275 (9). Section 31-275 (9) (A) (i) defines "employee" in relevant part as *"any person* who . . . [h]as entered into or works under any *contract of service* . . . with an employer . . . . " (Emphasis added.) As is often the case in the context of workers' compensation legislation; see *Duni v. United Technologies Corp/Pratt & Whitney Aircraft Division,* supra, 239 Conn. 25; *Dos Santos v. F. D. Rich Construction Co.* , 233 Conn. 14, 20, 658 A. 2d 83 (1995) ; the statutory language provides no *express* guidance as to whether the legislature intended to include illegal aliens in the group of "persons" for whom the Workers' Compensation Act provides the exclusive means of

obtaining compensation for work related injuries. The legislature's use of the term "*any* person"; (emphasis added); rather than "a person . . . however, strongly suggests an intent to include all workers, rather than only workers legally present in this country, within the group of persons able to invoke the remedy provided by the Workers' Compensation Act. Moreover, the fact that § 31-275 (9) (B) expressly excludes certain persons, but not illegal aliens, from the definition of "employee" also suggests that the legislature did not intend to exclude illegal aliens from the purview of § 31-275 (9). "(U)nless there is evidence to the contrary, statutory itemization indicates that the legislature intended the list to be exclusive." (Internal quotation marks omitted.) *Zachs v. Groppo,* 207 Conn. 683, 692-93, 542 A.2d 1145 (1988); see also *B. F. Goodrich Co. v. Dubno*, 196 Conn. 1, 6, 490 A. 2d 991 (1985) ; *State v. Kish,* 186 Conn. 757, 766, 443 A.2d 1274 (1982); accord *Sure-Tan, Inc. v. National Labor Relation Board,* supra, 467 U.S. 892 ("[s]ince undocumented aliens are not among the few groups of workers expressly exempted by Congress, they plainly come within the broad statutory definition of employee'" contained in National Labor Relations Act); *Patel v. Quality Inn South,* supra, 846 F.2d 702 (broad definition of "employee" followed by specific exceptions strongly suggests Congressional intent to include all workers not specifically excepted within purview of Fair Labor Standards Act).

A brief review of the legislative genealogy of §31-275 (9) (A) (i) is informative in discerning the legislative intent with regard to illegal aliens. The Workers' Compensation Act has been a part of our law since 1913. See Public Acts 1913, c. 138; see also *Bouley* v. *Norwich,* 222 Conn. 744, 751, 610 A.2d 1245 (1992); A. Grillo, "Fifty Years of Workmen's Compensation -- An Historical

Review," 38 Conn. B.J. 239, 246 (1964) . When enacted in 1913, it defined "employee" as meaning "any person who has entered into or works under any contract of service or apprenticeship with an employer. . . . " Public Acts 1913, c. 138, pt. B, § 43. Although the Workers' Compensation Act subsequently has been amended to exclude certain persons from the operative definition of "employee"; see General Statutes § 31-275 (9) (B); and to bring certain public employees who do not work under a "contract of service" within the purview of the act; see General Statutes § 31-275 (9) (A) (iii) through (vi); the operative definition of "employee" has remained unchanged since 1913. See General Statutes § 31-275 (9) (A) (i).

We turn next to the legislative history of chapter 138 of the 1913 Public Acts. "It is now well settled that testimony before legislative committees may be considered in determining the particular problem or issue that the legislature sought to address by the legislation. . . . This is because legislation is a purposive act . . . and, therefore, identifying the particular problem that the legislature sought to resolve helps to identify the purpose or purposes for which the legislature used the language in question." (Citations omitted.) *United Illuminating Co. v. New Haven,* 240 Conn. 422, 450, 692 A.2d 742 (1997); see *State v. Ledbetter*, 240 Conn. 317, 337, 692 A.2d 713 (1997); *Frillici v. Westport,* 231 Conn. 418, 430-31 n.15, 650 A.2d 557 (1994); *State v. Magnano,* 204 Conn. 259, 273 74 n.8, 528 A.2d 760 (1987). During the committee hearings on the bill that ultimately became chapter 138 of the 1913 Public Acts, Professor Willard C. Fisher, an economist from Wesleyan University who had been engaged by the Standing Committees on Judiciary and Labor to assist in drafting the Workers' Compensation Act; A. Grillo, supra, 38 Conn. B.J. 244-45;

remarked that "[u]nless the employer is required to pay the same (insurance premium for all workers) he is . . . under inducement to take on [uncovered workers] . [the Workers' Compensation Act] must not . . . .exclude aliens from the benefits; because there would be precisely the same inducement under such a provision for an employer to take on the men who are not citizens of the country.' Conn. Joint Standing Committee Hearings, supra, p. 124. He further stated that "the (proposed] bill is open to serious criticism . . . [and] you must not allow discrimination between aliens and residents and citizens. Connecticut cannot afford to discriminate against the employment of her own citizens . . . . " Id., pp. 226-27. In light of the legislature's explicit consideration of whether aliens should be excluded from the purview of the Workers' Compensation Act, the fact that, when ultimately adopted, chapter 138 of the 1913 Public Acts did not contain a provision excluding aliens from the statutory scheme is clear evidence that the legislature intended aliens to come within the statutory definition of an employee as *any person who* . . . enters into or works under *any contract of service* . . . . " (Emphasis added.) General Statutes § 31-275 (9) (A) (i); see Public Acts 1913, c. 138, pt. B, § 43. Furthermore, we previously have stated that the Workers' Compensation Act "applies to every *natural or artificial person who enters upon a contract of employment";* (emphasis added) *Douthwright v. Champlin,* 91 Conn. 524, 528, 100 A. 97 (1917); and "includes *every alien* of any nationality." (Emphasis added.*) Frasca v. City Coal Co.,* 97 Conn. 212, 214, 116 A. 189 (1922). "[The] language [of the Workers' Compensation Act] is not that of restriction or limitation, but all-embracing . . . . [I]t applies to all *contracts* of employment and this was intended to mean . . . *by whomsoever made.* . . . It defines an employer and an employee as any person. *It excepts certain classes, and the*

designation of these exceptions marks the only limitation upon the definition." (Emphasis added.) *Douthwright v. Champlin,* supra, 527.

There is nothing in the language or legislative history of § 31-275 (9) (A) (i) to indicate that the legislature intended to include legal aliens but exclude illegal aliens from the purview of the Workers' Compensation Act, and the rationale for not excluding aliens from the group of "persons" potentially able to invoke the remedy provided by the act applies with equal force to both legal and illegal aliens. Moreover, at the time § 31-275 (9) (A) (i) was enacted, it was not unlawful for an employer to hire an undocumented alien, nor was it a criminal offense for an alien to accept employment after entering this country illegally. See *Sure-Tan, Inc. v. National Labor Relations Board,* supra, 467 U.S. 893. Consequently, there is no evidence to suggest that the legislature, having intended to include aliens within the purview of the Workers' Compensation Act, did not also intend an employment agreement between an employer and a worker who is an illegal alien to constitute a "contract of service" within the meaning of the act. We conclude, therefore, that the legislature intended to include illegal aliens in the group of "persons" who, in order to obtain compensation for work-related injuries, are not only eligible, but also required, to invoke the remedy provided by the Workers' Compensation Act and that the legislature intended employment agreements between illegal aliens and their employers to constitute "contracts of service" as is required by § 31-275 (9)(A) (i) to establish the employer-employee relationship.

The respondents nevertheless maintain that even if illegal aliens come within the definition of "employee"

provided by the Workers' Compensation Act, the employment agreement between the claimant and the respondents, having been tainted by illegality as a result of the claimant's immigration status and the respondents' actions in knowingly employing an undocumented alien, does not constitute a "contract of service" as is required by § 31-275 (9) (A) (i-). Specifically, the respondents reason that: (1) the employment agreement between the respondents and the claimant is an "illegal" contract; (2) such contracts are "null and void"; and (3) consequently, there was no "contract" and, therefore, no "contract of service" between the claimant and the respondents. Although we agree with the respondents that "under the [Workers' Compensation Act] . . . coverage must arise from a contract of employment, either express or implied"; *Blancato v. Feldspar Corp.* , 203 Conn. 34, 38, 522 A.2d 1235 (1987); *Sibley v. State,* 89 Conn. 682, 686 87, 96 A. 161 (1915); we do not agree that an employment agreement between an employer and an illegal alien is so tainted by illegality that, as a matter of law, the agreement cannot constitute a "contract of service" within the meaning of § 31-275 (9) (A) (i).

In dictum in *Kenez v. Novelty Compact Leather Co.*, 111 Conn. 229, 234-35, 149 A. 679 (1930), the only case in which this court previously has considered what impact, if any, a taint of illegality in an employment agreement has upon a worker's status as an employee under § 31-275 (9) (A) (i), we discussed, but did not apply to the employment agreement at issue, the common-law doctrine against judicial enforcement of "illegal" contracts. Accordingly, a brief overview of that doctrine is helpful before we turn to the merits of the respondents' claim.

As a general rule, a "court will [not] lend its assistance

in any way toward carrying out the terms of a contract, the *inherent purpose* of which is to violate the law . . . but if both parties are in pari delicto, the law will leave them where it finds them" (Emphasis added.) *Tator* v. *Valden,* 124 Conn. 96, 101, 198 A. 169 (1938) ; see *Connecticut Importing Co.* v. *Janowitz,* 128 Conn. 433, 436, 23 A. 2d 514 (1941) *Vaszauskas* v. *Vaszauskas, 115* Conn. 418, 423, 161 A. 856 (1932). " It is not for [a defendant's] sake however that the objection [to enforcement of the contract] is ever allowed, but [the court's refusal to enforce the contract] is *founded in general principles of policy* [of] which the defendant has the advantage . . ." (Emphasis added; internal quotation marks omitted.) *Funk v. Gallivan,* 49 Conn. 124, 128 (1881); see *Beit* v. *Beit,* 135 Conn. 195, 199 200, 63 A.2d 161 (1948); see also *Vaszauskas v. Vaszauskas,* supra, 424 ("'principle of public policy . . . leads courts to refuse to act'"). Thus, it is in order to effectuate an underlying public policy, rather than to sanction a party seeking to enforce an "illegal" contract, that courts refuse to lend assistance to those who have contributed to the illegality that taints the contract.

In *Kenez v. Novelty Compact Leather Co.* , supra, 111 Conn. 229, as in the present case, the taint of illegality did not arise by virtue of a contractual provision that required the employee to engage in an unlawful activity. Instead, it arose in connection with a child labor statute, which, like the Immigration Reform Act, had not been enacted at the time the Workers' Compensation Act was adopted and which, like the Immigration Reform Act, prohibited the making of certain employment agreements.[14] Id., 234-35. Seeking to

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[14]In order to secure employment, the plaintiff in *Kenez*, who was a minor, misrepresented his age. The defendant employer failed to comply with a statute requiring employers to obtain a certificate attesting

avoid liability under the Workers' Compensation Act, the employer maintained that the employment agreement at issue in *Kenez* did not constitute a "contract of service," because the "legislature must . . . have intended. . . to include only legal contracts and therefore it cannot have intended to include one made in violation of [the child labor] statute." Id., 234. The court determined that construing the employment agreement to constitute a "contract of service" under the Workers' Compensation Act would accord with both the language and legislative intent of the Workers' Compensation Act. Id., 236-37. The court noted that, with respect to the violation of the child labor law, the parties were not in pari delicto and that the common-law doctrine against judicial enforcement of "illegal" contracts might preclude a court from enforcing the *employer's* rights under the prohibited employment agreement. Id., 234; see *Blancato v. Feldspar Corp.* , supra, 203 Conn. 38-39. Seeking to ascertain the legislature's intent regarding the relevant statutes; *Kenez v. Novelty Compact Leather* Co., supra, 232; the court considered the effect that construing employment agreements involving illegally employed minors as "contracts of service" would have on the public policy underlying the child labor law and concluded that giving effect to the contract would further, rather than impede, that policy. Id., 236. Observing that "[w]hatever the legal situation with reference to the employment of a minor in contravention of the [child labor] statute, *he is in fact an employee,* working for and under the direction of his employer"; (emphasis added) id.; the court concluded that the taint of illegality that had attached to the employment agreement by virtue of the

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to a minor's eligibility, under criteria set forth in the statute, for employment. *Kenez v. Novelty Compact Leather Co.,* supra, 111 Conn. 232.

child labor statute did not preclude the court from effectuating the legislature's intent with respect to the Workers' Compensation Act by construing the tainted employment agreement to be a "contract of service" and thereby bringing the claimant's claim within the jurisdictional confines of the Workers' Compensation Act. Id., 236-37.

We turn now to the merits of the respondents' claim that the illegal taint attached to the employment agreement between the respondents and the claimant by virtue of the claimant's immigration status precludes that agreement from constituting a "contract of service" under § 31-275 (9) (A) (i) . Having already determined on the basis of the language and legislative history of the Workers' Compensation Act that including illegal aliens within the scope of § 31-275 (9) (A) (i) accords with the language and apparent legislative intent of that act, we turn to the question of whether effectuating that intent would contravene the public policy underlying the Immigration Reform Act.

The primary purpose of the Immigration Reform Act was to establish procedures that inhibit the employment of undocumented workers and to punish employers who knowingly offer jobs to those workers. *National Labor Relations Board v. A.P.R.A. Fuel* Oil *Buyers Group, Inc.*, supra, 134 F. 3d 55-56. The goal of the Immigration Reform Act was "to reduce the incentives for employers to hire illegal aliens." Id. As the legislative history of the Workers' Compensation Act indicates, if employers who knowingly employ illegal aliens were able to avoid liability under the Workers' Compensation Act for work-related injuries sustained by those workers, there would be no reason for such employers to obtain workers' compensation coverage for undocumented workers. Conn. Joint Standing Committee

Hearings, supra, p. 124. Permitting employers to avoid liability under the Workers' Compensation Act, therefore would not only provide employers with a financial incentive to hire illegal aliens in contravention of the policy of nondiscrimination embodied in the Workers' Compensation Act; id., p. 227; it would also provide unscrupulous employers with an incentive to employ undocumented workers; id., p. 124; *Mendoza v. Monmouth Recycling Corp.*, supra, 288 N.J. Super. 247; *Montoya v. Gateway Ins. Co.*, supra, 168 N.J. Super. 104; see also *Sure-Tan, Inc. v. National Labor Relations Board,* supra, 467 U.S. 893; *Patel v. Quality Inn South,* supra, 846 F.2d 704; and thereby violate the Immigration Reform Act. We conclude, therefore, that including employment agreements between illegal aliens and their employers within the purview of "contracts of service," under § 31-275 (9) (A) (i) not only would effectuate the intent of the legislature with respect to the Workers' Compensation Act, it also would accord with, rather than contravene, the public policy Congress espoused when the Immigration Reform Act was enacted. Because construing the employment agreement between the claimant and the respondents as a "contract of service" under § 31-275 (9) (A) (i) would not contravene the public policy implemented when the Immigration Reform Act was enacted, we also conclude that judicial enforcement of the claimant's rights under the Workers' Compensation Act cannot be said to undermine either the common-law doctrine against judicial enforcement of "illegal" contracts or the effect, if any, that doctrine may have upon the enforceability of both the claimant's and the respondents' contractual rights under their employment agreement.

In relying on the doctrine against judicial enforcement of "illegal" contracts, the respondents, in effect, urge us to

recognize an exception to the Workers' Compensation Act for reasons of public policy. We, however, consistently have eschewed recognizing such exceptions, repeatedly observing that the Workers' Compensation Act "represents a complex and comprehensive statutory scheme balancing the rights and claims of the employer and the employee arising out of work-related personal injuries'"; *Libby v. Goodwin Pontiac-GMC Truck, Inc.*, 241 Conn. 170, 174, 695 A. 2d 1036 (1997) ; *Durniak v. August Winter & Sons, Inc.*, 222 Conn. 775, 781, 610 A.2d 1277 (1992) ; and that "'the responsibility for carving out exceptions from any one of its provisions belongs to the legislature and not to the courts.'" *Libby v. Goodwin Pontiac-GMC Truck, Inc.* , supra, 174 75; *Durniak v. August Winter & Sons, Inc.*, supra, 781; *Bouley v. Norwich,* supra, 222 Conn. 760; *Panaro v. Electrolux Corp.* , supra, 208 Conn. 605; *Mingachos v. CBS, Inc.*, supra, 196 Conn. 106. "Because of the statutory nature of our workers' compensation system, policy determinations as to what . . . jurisdictional limitations apply . . . *are for the legislature not the judiciary* . . . to make." (Emphasis added.) *Discuillo v. Stone & Webster,* supra, 242 Conn. 577.

Moreover, there is support for the proposition that an illegal alien's immigration status does not, as a matter of public policy, preclude him from falling within the definition of "employee" in § 31-275 (9) (A) (i). We find that support in the fact that when the legislature acted to exclude illegal aliens from eligibility for unemployment compensation[15] and

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[15]See General Statutes § 31-227 (f); see also Public Acts 1990, No. 90-314, §2.

general assistance[16] , it took no action to amend the Workers' Compensation Act to exclude illegal aliens. We conclude, therefore, that any illegality that attached to the employment agreement between the claimant and the respondents' by virtue of the claimant's immigration status and the respondents' actions in knowingly employing an undocumented alien, does not preclude that employment agreement from constituting a "contract of service" within the meaning of § 31-275 (9) (A) (i).

Finally, we note that our conclusion that the claimant's immigration status does not preclude the claimant from meeting the jurisdictional standard of "employee" under § 31-275 (9) is consistent with the view of a majority of our sister states that "[v]iolation of a statute or commission of a crime does not affect a [workers'] compensation claim when the illegal feature of the conduct was not the causative factor in producing the injury." 2A. Larson & L. Larson, Workers' Compensation (1997) § 35.20, p. 6-150 ("[a] very important application . . is that illegal entry into this country does not deprive an alien of compensation rights"); see also *Cenvill Development Corp. v. Candelo,* 478 So. 2d 1168, 1170 (Fla, App. 1985), review denied, 488 So. 2d 67 (Fla. 1986) (illegal aliens are "employees"; employer who knowingly employed such alien estopped from asserting immigration status as defense to claim that compensable injury caused lost wages); *Gene's Harvesting v. Rodriguez,* 421 So. 2d 701 (Fla. App. 1982) (aliens are "employees"; nothing in statute suggests legislature intended to include legal aliens but exclude illegal aliens from definition); *Artiga v. M.A. Patout & Son,* 671 So. 2d 1138, 1139 (La. App. 1996) (claimant cannot be denied

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[16]See General Statutes § 17b-116; see also Public Acts, Spec. Sess., May, 1992, No. 92-16, § 5.

workers' compensation benefits because of status as illegal alien); *Mendoza v. Monmouth Recycling Corp.*, supra, 288 N.J. Super. 245 ("purpose, policy and mechanism of the workers' compensation scheme are entirely consistent with the availability of benefits to illegal aliens . . . employed [in violation of the Immigration Reform Act] who are injured on the job"); *Fernandez-Lopez v. Jose Cervino, Inc.*, 288 N.J. Super. 14, 18, 671 A.2d 1051 (1996) (statute defines employee as "all natural persons . . . who perform service for an employer . . . unless . . . expressly excluded, [undocumented aliens] self evidently fall within . . . the definition" ([citation omitted]); *In the Matter of Testa v. Sorrento Restaurant, Inc.*, 10 App. Div. 2d 133, 134, 197 N.Y.S.2d 560, appeal denied, 8 N.Y.2d 705, 167 N. E. 2d, 650 (1960); *Lang v. Landeros*, 918 P. 2d 404, 406 (Okla App. 1996).[17]

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[17] In his dissenting opinion, Justice McDonald concludes that [p]ursuant to the Immigration and Nationality Act . . . entering into the contract [of employment] was illegal, the parties committed a criminal act by doing so, and the contract required the alien to commit a criminal act." Although the Immigration Reform Act makes it illegal for an employer knowingly to employ an undocumented alien, the act does not make it a crime for an undocumented alien to accept employment, nor does the act provide sanctions for doing so. Thus, unless the activities the claimant engaged in pursuant to her duties as a nanny and live-in housekeeper were otherwise unlawful, the employment agreement between the claimant and the respondents reasonably cannot be said to have required the claimant to commit a criminal act.

Moreover, in concluding that workers' compensation benefits provide an incentive for illegal aliens to enter this country, the dissent relies on the fact that federal law has been amended to preclude illegal aliens from receiving federal public benefits. The legislation to which the dissent refers is the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, 2260.

IV

The respondents next contend that the commission lacked jurisdiction over the claimant's claim for benefits because the employment agreement between the claimant and the respondents was invalidated by misrepresentations the claimant made on her employment application and, consequently, does not constitute a "contract of service" under § 31-275 (9) (A) (i). Specifically, the respondents reason that: (1) the claimant misrepresented her employment history on her application for employment with the respondents; (2) those misrepresentations render the employment agreement between the claimant and the respondents "void ab initio"; and (3) consequently, there was no "contract" and, therefore, no "contract of service" between the claimant and the respondents. Here, too, we disagree.

In essence, the respondents ask that we recognize an exception to eligibility under the Workers' Compensation Act in order to effectuate a public policy against resume fraud. This we cannot do. We reiterate that the responsibility for carving out exceptions from any one of [the] provisions [of the Workers' Compensation Act] belongs to the legislature and not to the courts"; *Libby v . Goodwin Pontiac-GHC Truck, Inc.* , supra, 241 Conn. 174-75; *Durniak v. August Winter & Sons, Inc.*, supra, 222 Conn. 781; *Bouley v.*

We agree that eligibility for public benefits such as welfare, food stamps and public housing operates as an incentive to enter or remain in this country illegally. We do not agree, however, that requiring an illegal alien who has sustained a work-related injury to forgo his right to bring a tort claim for damages against his employer and to accept, instead, workers' compensation benefits as compensatory damages for his injury provides a similar incentive.

Norwich, supra, 222 Conn. 760-61; *Panaro v. Electrolux Corp.,* supra, 208 Conn. 605; *Mingachos v. CBS, Inc.,* supra, 196 Conn. 106; and that "because of the statutory nature of our workers' compensation system, policy determinations as to what . . . jurisdictional limitations apply . . . *are for the legislature, not the judiciary* . . . to make." (Emphasis added.) *Discuillo v. Stone & Webster,* supra, 242 Conn. 577. "Although we recognize that, in enacting workers' compensation law, the legislature did not intend to create" 'a general health and benefit insurance program"; *Doe v. Stamford,* supra, 241 Conn. 698; *Hansen v. Gordon,* 221 Conn. 29, 32, 602 A.2d 560 (1992); "we do not read the act to include limitations on eligibility for compensation for which there is no statutory basis." *Doe v. Stamford,* supra, 698; *see Crochiere v. Board of Education,* 227 Conn. 333, 359, 630 A.2d 1027 (1993).

Furthermore, two provisions of the Workers' Compensation Act directly address worker fraud. General Statutes § 31-290c provides criminal and civil penalties for making a fraudulent claim for compensation benefits, and General Statutes §31-290d establishes the workers' compensation fraud unit of the chief state's attorney's office to investigate fraudulent claims. There is nothing whatsoever in those provisions of the Workers' Compensation Act to suggest that in addition to imposing penalties upon persons who fraudulently attempt to obtain benefits, the legislature also intended to sanction workers who make misrepresentations on their employment applications. Mindful that the theme of legislative preeminence guides our construction of the Workers' Compensation Act we decline the respondents' request for recognition of a resume fraud exception to that act. Such exception must come, if at all,

from the legislature[18].

V

The respondents further claim that the commissioner's order awarding benefits to the claimant is violative of their equal protection and due process rights under the United States and Connecticut constitutions[19]. They reason that: (1) the claimant's immigration status precludes her from

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[18]As a practical matter recognition of such an exception would lead to every workers' compensation claim. being investigated to determine whether the claimant had made a misstatement when hired. The commissioner consequently would be required to adjudicate questions of fact in a forum that is not suited for making wide-ranging factual determinations. See General Statutes § 31-298 (commissioner not bound by rules of evidence; no formal pleadings required). The remedy potentially available to employers for resume fraud is termination of employment.

[19]The fourteenth amendment to the United States constitution provides in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . ."

The constitution of Connecticut, article first, § 8, provides in relevant part: "No person shall . . . be deprived of life, liberty or property without due process of law. . ."

The constitution of Connecticut, article first, § 20, as amended by articles five and twenty-one of the amendments, provides: "No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability.

obtaining lawful employment[20], and consequently, if and when the claimant becomes able to work, she will not be able to do so; (2) because the claimant will be unable to work, the respondents will be required to continue making total disability payments to the claimant regardless of the fact that she is no longer disabled and (3) those payments, therefore, will deprive the respondents of equal protection and due process. The respondents' argument is based, therefore, on a hypothetical factual situation.

We frequently have noted "'the imprudence of adjudicating constitutional questions in a "factual vacuum." *Statewide Grievance Committee v. Whitney,* 227 Conn. 829, 844,633 A.2d 296 (1993); State *v. Floyd,* 217 Conn. 73, 78, 584 A.2d 1157 (1991); *Lehrer v. Davis,* 214 Conn. 232, 234, 571 A.2d 691 (1990); *Motor Vehicle Manufacturers Assn. of the United States, Inc. v. O'Neill,* 203 Conn. 63, 75, 523 A.2d 486 (1987). "[C]onstitutional issues do not exist in a vacuum. . . . The best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity. *Parker v. Los Angeles,* 338 U.S. 327, 333, 70 S. Ct. 161, 94 L. Ed. 144 (1949). *Moore v. McNamara,* 201 Conn. 16, 21, 513 A.2d 660 (1986)." (Internal quotation marks omitted.) *Statewide Grievance Committee v. Whitney,* supra, 844. "A party mounting a constitutional challenge to the validity of a statute must provide an adequate factual record in order to meet its burden of demonstrating the statute's adverse impact on some protected interest of its own, in its own particular case, and

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[20]At oral argument, the claimant indicated that she is currently married to a United States citizen and that her immigration status no longer precludes her from obtaining the documentation necessary for lawful employment.

not merely under some hypothetical set of facts as yet unproven. . . . We do not give advisory opinions, nor do we sit as roving commissions assigned to pass judgment on the validity of legislative enactments. Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function. " (Internal quotation marks omitted.) *Lehrer v. Davis,* supra, 234 35; *International Longshoremen's & Warehousemen's Union Local 37 v. Boyd,* 347 U.S. 222, 224, 74 S. Ct. 447, 98 L. Ed. 650 (1954); see *Hall v. Gilbert & -Bennett Mfg. Co.,* 241 Conn. 282, 306-307, 695 A.2d 1051 (1997).

The respondents' claim is based on future events that are speculative and hypothetical at this point, and consequently the claim does not present an "actual and existing controversy for us to adjudicate . . . ." (Internal quotation marks omitted.) *Hallas v. Windsor,* 212 Conn. 338, 347, 562 A.2d 499 (1989); *Murray v. Lopes,* 205 Conn. 27, 30, 529 A.2d 1302 (1987). In the unlikely event that the commissioner in the future orders the respondents to make disability payments to the claimant because, although no longer totally disabled, she is unable, by virtue of her immigration status, to obtain lawful employment, the respondents may raise this claim in any appeal that is taken from the commissioner's order.[21]

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[21]General Statutes § 31-315 authorizes the commissioner to retain jurisdiction over an award of workers' compensation benefits during the entire disability period and to modify such award in three situations. First, modification is permitted if "the incapacity of an injured employee has increased, decreased or ceased, or . . . the measure of dependence an account of which the compensation is paid has

VI

The respondents' final claim is that the commissioner abused his discretion by ordering the respondents to pay a $10,000 fine to the second injury fund for failing to comply with the workers' compensation insurance and self-insurance requirements provided in 31-284. We agree.

In determining whether the commissioner abused his discretion, we make every reasonable presumption in favor of sustaining the commissioner's action, and the manner in which his or her discretion has been exercised will not be disturbed as long as there is a reasonable basis for its exercise. See *Gelinas v. West Hartford,* 225 Conn. 575, 592, 626 A.2d 259 (1993); *Walton v. New Hartford,* 223 Conn. 155, 169-70, 612 A.2d 1153 (1992). We note that General Statutes (Rev. to 1995) § 31-288 (c) authorizes the commission to assess "a civil penalty of *not more than ten thousand dollars"* against employers who do not comply with the relevant coverage requirements. (Emphasis added.) We do not believe, however, that the legislature intended the commissioner to impose the maximum possible penalty on an employer who, as a first offender, fails to obtain coverage for a single employee *within the first two weeks of that*

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changed. . . Second, an award may be modified if "changed conditions of fact have arisen which necessitate a change of (the award)." Third, "[t]he commissioner [also has] the same power to open and modify an award as any court of the state has to open and modify a judgment of such court." General Statutes § 31-315; see *Marone v. Waterbury,* 244 Conn. 1, 14 16, _ A.2d _ (1998). Moreover, such awards are modified by way of a separate action brought in accordance with the procedures required for original workers' compensation claims; id.; and an appeal may be taken from a modified award pursuant to §31-101.

employee's engagement. In the circumstances of this case, therefore, we conclude that the $10,000 penalty was excessive.

The decision of the board is affirmed with respect to the compensability of the claimant's injuries and the board's related orders; the decision of the board is reversed with respect to the order of the commissioner directing the respondents to pay a fine of $10,000 to the second injury fund and the case is remanded to the board with direction to vacate the commissioner's order insofar as he imposed a fine of $10,000 upon the respondents and to remand the case to the commissioner for further proceedings with respect to the amount of fine, if any, to be imposed.

In this opinion NORCOTT, KATZ and PALMER, Js., concurred.

(DOWLING v. SLOTNIK -- DISSENT)

MCDONALD, J., dissenting. I do not agree that an illegal alien engaged in an illegal contract of employment is eligible for workers' compensation benefits. As the majority points out, the right to receive workers' compensation benefits arises only in an employer-employee relationship. *Kinney v. State,* 213 Conn. 54, 60, 566 A.2d 670 (1989). Such benefits are granted "without regard to fault" and imposed as "a form of strict liability on the employer." *Panaro v. Electrolux Corp.* , 208 Conn . 589, 599, 545 A. 2d 1086 (1988). The employment relationship is, therefore, at the heart of workers' compensation coverage.

This case concerns an alien, the claimant, Victoria Dowling, who illegally remained in the United States and a

Connecticut couple, the named respondent, Sol Slotnik, and the respondent Diane Reverand, who, knowing her status, hired her as a live-in nanny and housekeeper. The alien claims a 1994 work-related injury and compensation. The respondents claimed no responsibility for such benefits because the claimant was an illegal alien.

Contrary to the majority, I conclude that employment benefits are an incentive for illegal immigrants to enter or remain in this country. Whatever effect requiring those hiring illegal aliens to pay workers' compensation benefits may have to discourage that practice, it cannot be disputed that our decision confers employment benefits on illegal aliens, In doing so, it obviously makes employment in this country more attractive. In 1996, Congress explicitly recognized the compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits. It then provided that illegal aliens in general are not eligible for any federal public benefits. Pub. L. 104-193, Title IV, 5 400, Aug. 22, 1996, 110 Stat. 2260.

The effect of creating an incentive for the illegal immigrant to enter or remain in this country leads me to conclude that the contract of service in this case was illegal and does not give rise to workers' compensation benefits. Pursuant to the Immigration and Nationality Act[1], 8 U.S.C. § 1101 et seq., entering into the contract was illegal, the parties committed a criminal act by doing so, and the contract required the alien to commit a criminal act. The majority

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[1]The Immigration and Nationality Act was amended by the Immigration Reform and Control Act of 1996, Pub. L. No. 99-103, 100 Stat. 3359 (1986).

recognizes such an illegal contract, entered into illegally by both the illegal alien and the knowing parents. In *Kenez v. Novelty Compact Leather Co.*, 111 Conn. 229, 194 A. 679 (1930), this court refused to apply the doctrine of illegal contract to deny workers' compensation benefits to a child laborer. We stated that the child was not the "real wrongdoer" when entering into the contract; id., 234; and that the child labor statute was plainly enacted for the benefit of children. Id., 233. In this case, the circumstances are strikingly different. The Immigration and Nationality Act was passed to benefit not the illegal immigrant but to benefit our citizens and legal immigrants. By accepting unemployment benefits, the illegal alien deprives our citizens and legal immigrants of that employment opportunity. Moreover, the alien is the "real wrongdoer" creating the illegality by entering or remaining in this country illegally.

In this case, the alien is seeking to enforce her rights to benefits which, if given, will, in my view, violate an important public policy. Our decision today, in light of the Immigration and Nationality Act, does clear and manifest damage to the goal of Congress to stem the "vast tide of illegal immigration" resulting in literally millions of undocumented aliens in the United States." *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 481, 111 S. Ct. 888, 112 L. Ed. 2d 1005 (1991). Concentrating our fire on the employer while at the same time conferring employment benefits on the illegal alien does not support our policy of controlling our borders. It is a mystery to me how providing state mandated employment benefits to illegal aliens will discourage them from coming to our shores or remaining here.

Accordingly, I respectfully dissent.

it is illegal for an illegal alien to work in the United States. See 8 C.F.R. § 274a.12 (1998). Furthermore, the Immigration and Nationality Act provides criminal penalties for aliens who remain in the United States for thirty days or longer without obtaining required documentation. 8 U.S.C. §§ 1306, 1302.

APPENDIX B — DECISION OF THE STATE OF CONNECTICUT WORKERS' COMPENSATION COMMISSION DATED FEBRUARY 9, 1996

VICTORIA DOWLING CONSIDINE
CLAIMANT : CORAM

VS.

SOL V. SLOTNIK & DIANE REVERAND
RESPONDENT/EMPLOYERS : WORKER'S COMPENSATION COMMISSION

-AND-

FOURTH DISTRICT

SECOND INJURY FUND
RESPONDENTS : File No. 411897

APPEARANCES: : February 9, 1996

The claimant was represented by Attorneys Nicholas Wocl and Andrew Cannella, Tooher, Puzzouli & Wocl, 1100 Summer Street, Stamford, CT. 06905.

The respondents were represented by Attorneys Nancy Aldrich and John Aldrich, Aldrich & Aldrich, 830 Post Road East, Westport, CT 06880.

The Second Injury and Compensation Assurance Fund was represented by Assistant Attorneys General Kenneth Kennedy, Jr., Michele Truglia and Michael Giammatteo, 55 Elm Street, PO Box 120, Hartford, CT 06140.

FINDING AND AWARD

Pursuant to statutory notice, hearings in the above-captioned matter were held in Bridgeport, Connecticut, in the offices of the Workers' Compensation Commission for the Fourth District, as will appear of record , and continued to October 31, 1995 for proposed draft findings and briefs.

1. On February 14, 1994, the claimant was hired by Sol V. Slotnik and Diane Reverand as a live-in-housekeeper and nanny.

2. At the time of the claimant's employment the employer's household consisted of Sol Slotnik, Diane Reverand and their two boys, Steven, then age nine, and Daniel then age eleven.

3. On February 28, 1994, at approximately 1:00 p.m., the claimant, during the course of her employment, was going to get the mail and was walking Daisy, the family dog, when she was caused to slip and fall on some ice which had accumulated on the driveway near the entrance to the house located at 2 Rustic Lane, Westport, Connecticut. IT IS SO FOUND.

4. At that time the claimant was holding the dog's leash with her left hand and when she fell she struck the ground with her right hand, causing her to sustain various injuries, including her right master hand and arm.

5. On the evening of February 28, 1994 the claimant reported to Sol Slotnik and Diane Reverand that she was taking Daisy for a walk and when coming back to the house she had slipped and fallen on ice.

6. The day after the fall the claimant went to the emergency section of the Stamford Hospital.

7. The day or two after the Stamford hospital visit, the claimant called Dr. Steven Kunkes, a personal friend of the Slotniks, who prescribes some medication for the claimants's hand injury.

8. On March 9, 1994 the claimant saw Dr. W. Tracy Schmidt, an orthopedic surgeon, for an evaluation of her right hand. The doctor ordered x-rays, and the faxed report stated that there were no fractures.

9. On May 6, 1994 Dr. Schmidt treated the claimant for pain in her right hand and tingling and numbness in the ulnar distribution. He was of the opinion that the claimant's condition had gotten worse.

10. Because of the continuation of symptoms and failure to get relief, Dr. Schmidt ordered an EMG and nerve conduction studies.

11. The claimant saw Dr. Schmidt on June 6, 1994 for recheck of her hand and he diagnosed severe pain in her ulnar distribution which was radiating from her wrist up her forearm and into her shoulder. He found that the claimant started to develop rash-like lesions similar to shingles in the right forearm along the ulnar nerve distribution.

12. Dr. Schmidt's impression was more a neuritis than a compression neuropathy. He further felt the claimant has a post-traumatic stress disorder and possibly has developed shingles which might be more of a medical problem and referred the claimant to Dr. Santi Neuberger, her

family physician.

13. Dr. Neuberger, an internal medicine specialist, saw the claimant on June 7, 1994 and found that she had developed persistent pain in the right forearm extending into right elbow and right shoulder, associated with hypoesthesia and intermittent dyesthesias in the lateral aspect of the right forearm. This was associated with a functional loss of use of her fourth and fifth digits.

14. The EMG on May 31, 1994 was a limited exam, showing a right upper extremity, right ulnar neuropathy without localization.

15. Due to the refractory nature of the claimant's pain, Dr. Neuberger referred her to Dr. Evangelos Xistris for a neurologic evaluation.

16. Dr. Neuberger was of the medical opinion that the claimant continues to be unable to work due to both pain and the lack of use of her right arm, associated with her fall injury.

17. The claimant was initially referred to Dr. Xistris by Dr. Schmidt in order to rule out an ulnar neuropathy. The EMG at the time did reveal minor evidence for ulnar neuropathy.

18. The claimant was formally evaluated by Dr. Xistris, a board certified neurologist, at the request of Dr. Neuberger on June 20, 1994.

19. Dr. Xistris took a history from the claimant and conducted a medical examination.

20. Dr. Xistris, original medical impression was that the claimant suffered a right brachial plexopathy when she fell. He became the claimant's treating doctor and referred her for various medical testing procedures and recommended that she stay out of work.

21. Dr. Xistris referred the patient to Dr. Gavin McLeod, a board certified physician in internal medicine and infectious diseases, for evaluation for possible Lyme disease.

22. Dr. McLeod was of the medical opinion that Lyme disease was not the cause of her symptoms. IT IS SO FOUND.

23. Dr. Xistris continued to treat the claimant for her symptoms, which have not improved.

24. Dr. Xistris was of the opinion based upon reasonable medical certainty that the claimant's injuries, diagnosed as right brachial plexopathy and reflex sympathetic dystrophy and right ulnar neuropathy, are causally connected to her fall of February 28, 1994. IT IS SO FOUND.

25. Dr. Xistris was of the medical opinion that the injuries the claimant suffered as a result of her fall are likely to be permanent but claimant has not as yet reached maximum medical improvement.

26. Dr. Xistris was of the medical opinion that the claimant was temporarily totally disabled from June 24, 1994 to August 30, 1995. IT IS SO FOUND.

27. Dr. Xistris was of the further medical opinion that the claimant was going to be temporarily totally disabled

for some period of time in the future. IT IS SO FOUND.

28. IT IS FOUND that the claimant has incurred reasonable and necessary medical expenses which are causally connected to the work-related injuries of this claim, including but not limited to:

St. Joseph Medical Center	$	569.78
Orthopaedic Associates		510.00
Santi J. Neuberger, M.D.		73.00
Evangelos Xistris, M.D.		1,884.50
St. Joseph Medical Center		227.81
Santi J. Neuberger, M.D.		58.00
W. Tracy Schmidt, M.D.		380.00
Stamford Hospital		1,451.24
CVS Pharmacy (Store # 1219)		49.86
CVS Pharmacy (Store # 1051)		605.96
CVS Pharmacy (Westport)		12.19
Stamford Radiological Associates		233.61
Infectious Disease Associates		460.00
Walgreen Pharmacy		485.68
MetPath New England		80.00
TOTAL MEDICALS		**$7,081.63**

29. The respondents provided the claimant with and paid for the claimant's medical treatment between February 28, 1994 and June 24, 1994. IT IS SO FOUND.

30. The oral agreement between the claimant and respondents provided that the claimant receive free room and board for a five day week, no weekends, use of a motor vehicle when one was available, allowance towards a private phone and a weekly gross salary of $400.00.

31. IT IS FOUND that the respondents furnished the claimant with a room with access to a shared bathroom. The room had no separate kitchen and no separate entrance or deck. The claimant had use of the room from Monday to Friday evening. Said room was used by members of the respondents' family and guests periodically.

32. IT IS FOUND that a reasonable value for a five day use of the nanny's room is $100.00 per week.

33. IT IS FOUND that the respondents paid the claimant $25 per month toward her private phone, which equates to $6.25 per week.

34. IT IS FOUND that the respondents provided the claimant with family food for five days per week, with a reasonable value of $60.00 per week.

35. IT IS FOUND that the claimant has not sustained her burden of proof concerning the issue of the value of the use of one of the three automobiles, when available, and her claim for use of an automobile is DENIED.

36. IT IS FOUND that the claimant has failed to sustain her burden of proof concerning the worth of the free motor vehicle insurance, and her claim for said insurance is DENIED.

37. IT IS FOUND that the claimant, who was single without dependents, has a workers' compensation rate of $325.35.

38. The respondents have advanced to the claimant without prejudice the sum of $7,000.00. IT IS SO FOUND.

39. Dr. Xistris claims a testimonial fee of $600.00 for his deposition testimony concerning his treatment of the claimant. IT IS FOUND that said fee is reasonable.

40. The respondents claim a defense that the Commissioner does not have subject matter jurisdiction and claims that the claimant was an illegal alien and not eligible to receive benefits under the State of Connecticut workers' compensation law. IT IS FOUND that said defense has no legal merit and is DENIED.

41. During the course of the trial, the respondent Sol Slotnik testified that the respondents were not in compliance with the insurance and self-insurance requirements of subsection (b) of Section 31-284, C.G.S. IT IS SO FOUND . I hereby assess a civil penalty of $10,000.00 (Ten Thousand Dollars) against the employers as provided in Section 31-288 C.G.S.

42. The respondents have unduly delayed payments of compensation to the claimant and she is entitled to interest at the rate of twelve (12) percent per annum and a reasonable attorney's fee. IT IS SO FOUND.

43. UPON REVIEW OF ALL THE EVIDENCE BEFORE ME, I AM SATISFIED, CONCLUDE AND FIND that the claimant sustained compensable injuries on February 28, 1994 arising out of and during the course of her employment with Sol V. Slotnik and Diane Reverand.

44. WHEREFORE, IT IS ORDERED, AWARDED, DAMAGED AND DECREED that:

A. Respondents pay all reasonable

medical, prescription and hospital bills incurred or to be incurred as a result of the claimant's injuries, if there are such bills, and to the extent they are not listed in Paragraph 28 above.

B . Respondents pay the claimant weekly compensation for temporary total disability in the amount of $325.25 per week for the period June 24, 1994 through August 30, 1995, a period of 61 6/7 weeks, equaling $20,125.22; said payments to include interest at the rate of twelve (12) percent per annum as provided in Section 31-300, C.G.S., due to the undue delay in payment of such benefits.

C. Respondents pay future temporary total disability benefits at the rate of $325.35 per week, from August 31, 1995 forward, subject to production of medical documentation confirming the same, until such time as she is no longer totally disabled due to her accepted compensable injuries found herein.

D. Respondents pay claimant's attorney a reasonable attorney's fee for unduly delayed payments of compensation. A hearing will be assigned to determine the amount of the fee.

E. Dr. Evangelos Xistris, who is FOUND to be a treating physician of the claimant, appeared and testified at a deposition on February 2, 1995, and the claimant has been successful in the issue. Accordingly, there is ALLOWED to Dr. Xistris a fee for his appearance and testimony in the amount of $600.00. The respondents are ORDERED to pay Dr. Xistris' fee through the office of the claimant's attorney.

F. Respondents pay to the Second Injury Fund the civil penalty set forth in Paragraph #41.

G. Respondents take credit for the $7,000 advance made to the claimant without prejudice as found in Paragraph #38.

/s/Frank J. Verrilli
Frank J. Verrilli
Commissioner

A copy of this Finding and Award is being sent to the Treasurer of the State of Connecticut, as custodian of the Second Injury Fund. If payments as ordered are not made within ten days by the respondent/employer, Sol Slotnik and Diane Reverand, the claimant will advise the undersigned in writing and a hearing will be held ordering the Second Injury Fund to pay all benefits. If this is done, the respondents/employer, as noted, shall be liable to the State for any such payments, together with attorney's fees as provided by Section 31-355 of the Act, as amended.

APPENDIX C — DECISION OF THE STATE OF CONNECTICUT COMPENSATION REVIEW BOARD DATED FEBRUARY 7, 1997

CASE NO. 3062 CRB-4-95-5
CASE NO. 3277 CRB-4-96-2

VICTORIA DOWLING CLAIMANT-APPELLEE	:	COMPENSATION REVIEW BOARD
V.		
SOL V. SLOTNIK & DIANE REVERAND EMPLOYERS-RESPONDENTS APPELLANTS COMMISSION	:	WORKERS' COMPENSATION
and		
SECOND INJURY FUND RESPONDENT-APPELLEE		FEBRUARY 5,1997

APPEARANCES:

The claimant was represented by Nicholas Wocl, Esq., Tooher, Puzzouli & Wocl, 1100 Summer St., Stamford, CT 06905.

The respondent Sol Slotnik appeared pro se at oral argument. The pro se respondent Diane Reverand waived oral argument, and went forth on her brief.

The Second Injury Fund was represented by Kenneth Kennedy, Esq., Assistant Attorney General, 55 Elm St., P.O. Box 120, Hartford, CT 06141-0120.

These Petitions for Review from the April 25, 1995 Bench Ruling and the February 9, 1996 Finding and Award of the Commissioner acting for the Fourth District were heard August 16, 1996 before a Compensation Review Board panel consisting of the Commission Chairman Jesse M. Frankl and Commissioners George A. Waldron and Robin L. Wilson.

OPINION

JESSE M. FRANKL, CHAIRMAN. The respondents have petitioned for review from the April 25, 1995 Bench Ruling and the February 9, 1996 Finding and Award of the Commissioner acting for the Fourth District. They contend that the commissioner improperly awarded benefits to the claimant because she was an illegal alien unlawfully employed at the time of her injury. We affirm the trial commissioner's decision.

This case is a bit unusual procedurally, as the respondents originally filed a petition for review from an oral ruling made by the commissioner at an April 25, 1995 hearing. That ruling, memorialized in the appellate record by two pages from the transcript, simply stated that the commissioner would find that the claimant was entitled to benefits for her

compensable injury irrespective of her possible illegal alien status. The respondents attempted to withdraw that appeal as premature on October 11, 1995, the day of their scheduled oral argument, because the issues raised by the respondents would be addressed in the commissioner's written findings and conclusions, to be issued at a later date. This request was denied, but the board ruled that the case could be rescheduled for oral argument at a later date.

The respondents filed their appellate brief on January 30, 1996. On February 9, 1996, the commissioner issued a Finding and Award ordering the respondents to pay temporary total disability benefits, medical and testimonial expenses, and attorney's fees for unduly delaying the payment of compensation. He also fined the respondents $ 10,000 for failing to have workers' compensation insurance. Included in the commissioner's decision was a rejection of the respondents' "illegal alien" defense. The respondents petitioned for review from that decision as well, although they did not file separate reasons for appeal and a separate brief.[1] We thus have only the respondents' initial appellate brief to consider in support of their appeals.[2]

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[1]We note that the appeal, which the Commission received on February 20, 1996, was timely filed, as February 19, 1996 was the observance of Washington's Birthday, a state legal holiday. See § 1-4 C.G.S.; *Diana v. C.H. Nickerson & Co.* 6 Conn. Workers' Comp. Rev. Op. 123, 124-25, 597 CRD-5-87 (1989).

[2]The claimant has, in fact, filed two motions to dismiss the respondents' appeals. The latter, which is directed at both appeals, simply states that the respondents have failed to prosecute with due diligence. The former, directed only at the first appeal, specifically notes that the respondents failed to timely file their brief, and also points out that the appeal is premature. Having been filed over a month after the appellants'

Recently, this board decided that the definition of "employee" in § 31-275(9) C.G.S. includes "any person," and is not limited to citizens or lawfully employed people. *Tavares v. Noel*, 2010 CRB-7-94-3 (decided March 8, 1996). In *Tavares,* a Brazilian native who had been injured while working as a gardener at his employer's residence was allowed to claim workers' compensation even though he possessed no documentation entitling him to work in this country. Noting the breadth of the statutory definition, we followed the lead of other states' decisions and Professor Larson's commentary in allowing the claimant to maintain his action.

Here, the claimant was employed by the respondents as a live-in housekeeper and nanny for their two sons. The oral agreement between the parties provided that the claimant receive free room and board for a five day work week, use of a motor vehicle when available, an allowance toward a private phone, and a gross weekly salary of $400.

While walking the family dog en route to the

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brief was actually received, the former motion is not timely under Practice Book § 4056; further, this board had already declined to allow withdrawal of the appeal. As for the latter motion to dismiss, the respondents indeed failed to file any documents in support of their second petition for review, including a Motion to Correct. Although the respondents have consequently lost their right to challenge any of the findings of the commissioner in his decision, see 3218 CRB-6-95-11 (decided Dec. 10, 1996), we recognize the somewhat unusual procedural background of this appeal.

Therefore, we will hold the respondents' brief applicable to both appeals, as the core issue is still present. The motions to dismiss are hereby denied.

respondents' mailbox on February 28, 1994, the claimant slipped on their icy driveway and fell, injuring her right arm and hand. The commissioner found her injuries compensable, and set her compensation rate at $325.35 per week. He ordered that the respondents pay the claimant temporary total disability payments from June 24, 1994 through August 10, 1995 at the above rate, along with interest at 12 percent per year. He also ordered the payment of temporary total disability benefits beyond August 31, 1995, subject to the production of medical documentation confirming the claimant's disability.

We see no basis in these facts to distinguish this case *Tavares*, from nor do we accept the respondents' invitation to reconsider our holding in that case. The fact that the United States government has criminalized the employment of illegal aliens in the Immigration Reform and Control Act, explicitly preempting state and local laws imposing civil or criminal sanctions on those hiring illegal aliens in the process, does not implicate the issue of workers' compensation benefits. Workers' compensation is not a punishment levied against individuals because they have hired illegal aliens; it is the product of remedial legislation that compromises an individual's right to a common law tort action for work-related injuries in exchange for relatively quick and certain compensation. *Green v. General Dynamics Corporation/Electric Boat Division*, 44 Conn. App. 112, 122 (1996) (Dupont, J. dissenting).

There is no relationship between the policies advanced by our Act and those behind the federal IRCA, and the latter does not preclude application of the former.

The claimant's inability to obtain other employment in

the United States due to her foreign citizenship and lack of a valid work permit would certainly restrict her from obtaining other employment. However, we do not believe that this affects the due process rights of the respondents. If the claimant is totally disabled, as the trial commissioner found her to be, she is by definition unable to work in any capacity based on her medical condition. See § 31-307 C.G.S. Thus, whether she is an illegal alien or not, she simply cannot work. As the trial commissioner anticipated in his award, however, the claimant may indeed be medically able to work again sometime in the future. At that time, she would no longer be entitled to total disability benefits under § 31-307. A claimant who is physically able to work is not totally disabled, and the respondents would not be expected to continue paying her total disability benefits. (Any potential entitlement to partial disability benefits is a completely separate issue that we decline to address here.)

The claimant's exaggeration of her past work experience on her job application might have given her employers a reason to dismiss her. It has no bearing, however, on either the existence of an employment relationship in this case, or the compensability of her injury. The issue here is not whether the claimant breached an oral employment contract; it is whether she was working for the respondents when she was injured. It is clear that she was in this case. It is also clear that her falsification of information in her application had nothing to do with her slipping on ice in the driveway and being injured. We will not allow the respondents to avoid liability on that ground.

The simple fact is, an employer would be placed in a highly advantageous position if it were able to avoid workers' compensation liability simply by hiring illegal aliens and

then raising their citizenship status as a defense whenever an injury occurred. Although this Commission certainly abhors violations of American immigration laws, our primary concern is to ensure that employees are compensated for injuries they suffer at work. When forced to address both of these concerns, we believe that the proper approach for this Commission is to provide protection for workers who happen to be illegal aliens. It is not our duty to punish them; rather, that duty falls upon a different branch of our government.

The respondent Sol Slotnik, who appeared on his own behalf at oral argument, raised an objection there to the $ 10,000 fine levied by the trial commissioner against the respondents for their failure to carry workers' compensation insurance. He stated that he had been unaware of the law requiring such insurance until after the claimant made her claim, and that he obtained the proper insurance for his employees once he found out about it. This ground for appeal would ordinarily be dismissed by this board without discussion, as the respondents first raised it at oral argument. See Mancini v. A-Laugeni & Son, Inc., 9 Conn. Workers' Comp. Rev. Op. 45, 739 CRD-5-88-6 (Feb. 4, 1991).

We note, however, that the employers' unawareness of the law requiring workers' compensation insurance was not a valid reason for their failure to obtain it, and the $10,000 fine was permissible under § 31-288(c) C.G.S. See *Proto v. Kenneth Grant d/b/a Kenney's Irish Pub*, 3030 CRB-8-95-3 (decided Nov. 26, 1996) (ignorance of law requiring insurance by small employer did not prevent imposition of fine under §§ 288(c)). Slotnik admitted at oral argument that he did not have the required insurance, and he also admitted it to the trial commissioner. We see no ground to reverse the commissioner's imposition of the $10,000 fine against the

employer.

The trial commissioner's decision is affirmed in all respects, and the respondents are ordered to comply with the commissioner's order for payment of benefits and interest.

Additionally the respondents are required by § 31-301c(b) to pay interest on any portion of the award that remained unpaid during the pendency of this appeal.

Commissioners George A. Waldron and Robin L. Wilson concur.
2/6/97

APPENDIX D — ORDER OF THE SUPREME COURT OF THE STATE OF CONNECTICUT DENYING MOTION FOR REARGUMENT DATED JUNE 25, 1998

STATE OF CONNECTICUT
SUPREME COURT

NO. SC 15711
VICTORIA DOWLING
v.
SOL V. SLOTNICK ET. AL. : JUNE 25, 1998

ORDER

THE MOTION OF THE DEFENDANTS, FILED JUNE 10, 1998, (1) FOR REARGUMENT AND RECONSIDERATION EN BANC AND (2) TO EXTEND THE DATE TO FILE THE MOTION FOR REARGUMENT AND RECONSIDERATION, HAVING BEEN PRESENTED TO THE COURT, IS HEREBY ORDERED GRANTED AS TO THAT PORTION OF THE MOTION REQUESTING THE EXTENSION OF THE FILING DATE OF THE MOTION FOR REARGUMENT AND RECONSIDERATION AND DENIED AS TO THAT PORTION OF THE MOTION REQUESTING REARGUMENT AND RECONSIDERATION EN BANC.

BY THE COURT,
/S/ FRANCIS J. DRUMM
CHIEF CLERK

NOTICE SENT: JUNE 25, 1998
SOL V. SLOTNICK
DIANE REVERAND

TOOHER & WOCL, LLC
KENNETH H. KENNEDY, JR.,
ASSISTANT ATTORNEY GENERAL
COMPENSATION REVIEW BOARD
(950003062S/960003277)

§1301. Alien seeking entry; contents

No visa shall be issued to any alien seeking to enter the United States until such alien has been registered in accordance with section 1201(b) of this title.

§1302. Registration of aliens.

(a) It shall be the duty of every alien now or hereafter in the United States, who (1) is fourteen years of age or older, (2) has not been registered and fingerprinted under section 1201(b) of this title or section 30 or 31 of the Alien Registration Act of 1940, and (3) remains in the United States for thirty days or longer, to apply for registration and to be fingerprinted before the expiration of such thirty days.

(b)

(c) The Attorney General may, in his discretion and on the basis of reciprocity pursuant to such regulation as he may prescribe, waive the requirement of fingerprinting specified in subsections (a) and (b) of this section in the case of any nonimmigrant.

§1305. Notices of change of address

(a) Notification of change

Each alien required to be registered under the subchapter who is within the United States shall notify the Attorney General in writing of each change of address and

new address within ten days from the date of such change and furnish with such notice such additional information as the Attorney General may require by regulation.

(b) Current address of natives of any one or more foreign states.

The Attorney General may in his discretion, upon ten days notice, require the natives of any one or more foreign states, or any class or group thereof, who are within the United States and who are required to be registered under this subchapter, to notify the Attorney General of their current addresses and furnish such additional information as the Attorney General may require.

(c) Notice to parent or legal guardian

In the case of an alien for whom a parent or legal guardian is required to apply for registration the notice required by this section shall be given to such parent or legal guardian.

§1306 Penalties

(b) Failure to notify change of address

Any alien or any parent or legal guardian in the United States of any alien who fails to give written notice to the Attorney General, as required by section 1305 of this title, shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not to exceed $200 or be imprisoned not more than thirty days, or both. Irrespective of whether an alien is convicted and punished as herein provided, any alien

who fails to give written notice to the Attorney General, as required by section 1305 of this title, shall be taken into custody and removed in the manner provided by part IV of this subchapter, unless such alien establishes to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful.

(c) Fraudulent statements

Any alien or any parent or legal guardian of any alien, who files an application for registration containing statements known by him to be false, or who procures or attempts to procure registration of himself or another person through fraud, shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not to exceed $1,000, or be imprisoned not more than six months, or both; and any alien so convicted shall, upon the warrant of the Attorney General, be taken into custody and be removed in the manner provided in part IV of this subchapter.

§ 1324a. Unlawful employment of aliens

(a) Making employment of unauthorized aliens unlawful

(1) In general

It is unlawful for a person or other entity -

(A) to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3) of this section) with respect to such employment, **or**

(B) (i) to hire for employment in the United states an individual without complying with the requirements of subsection (b) of this section or (ii) if the person or entity is an agricultural association, agricultural employer, or farm labor contractor (as defined in section 1802 of Title 29) to hire, or to recruit or refer for a fee, for employment in the United States an individual without complying with the requirements of subsection (b) of this section.

(2) Continuing employment

It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.

(3) Defense

A person or entity that establishes that it has complied in good faith with the requirements of subsection (b) of this section with respect to the hiring, recruiting, or referral for employment of an alien in the United States has established an affirmative defense that the person or entity has not violated paragraph (1)(A) with respect to such hiring, recruiting, or referral.

(4) Use of labor through contract

For purposes of this section, a person or other entity who uses a contract, subcontract, or exchange, entered into, renegotiated, or extended after the date of the enactment of this section, to

obtain the labor of an alien in the United States knowing that the alien is an unauthorized alien (as defined in subsection (h)(3) of this section) with respect to performing such labor, shall be considered to have hired the alien for employment in the United States in violation of paragraph (1)(A).

(5) Use of State employment agency documentation

For purposes of paragraphs (1)(B) and (3), a person or entity shall be deemed to have complied with the requirements of subsection (b) of this section with respect to the hiring of an individual who was referred for such employment by a State employment agency (as defined by the Attorney General), if the person or entity has and retains (for the period and in the manner described in subsection (b)(3)) appropriate documentation of such referral by that agency, which documentation certifies that the agency has complied with the procedures specified in subsection (b) of this section with respect to the individual's referral.

(6) Treatment of documentation for certain employees

(A) In general

For purposes of this section, if-

(i) an individual is a member of a collective-bargaining unit and is employed, under a collective bargaining agreement entered into between one **or** more employee organizations and an association of two or more employers, by an employer that is a member of such association, and

(ii) within the period specified in subparagraph (B), another employer that is a member of the association (or an agent) of such association on behalf of the employer) has complied with the requirements of subsection (b) of this with respect to the employment of the individual, the subsequent employer shall be deemed to have complied with the requirements of subsection (b) of this section with respect to the hiring of the employee and shall not be liable for civil penalties described in subsection (e)(5) of this section.

(B) Period

The period described in this subparagraph is 3 years, or, if less, the period of time that the individual is authorized to be employed in the United States.

(C) Liability

(i) In general

If any employer that is a member of an association hires for employment in the United States an individual and relies upon the provisions of subparagraph (A) to comply with the requirements of subsection (b) of this section and the individual is an alien not authorized to work in the United States, then for the purposes of paragraph (1)(A), subject to clause (ii), the employer shall be presumed to have known at the time of hiring or afterward that the individual was an alien not authorized to work in the United States.

(ii) Rebuttal of presumption

The presumption established by clause (i) may be rebutted by the employer only through the presentation of clear

and convincing evidence that the employer did not know (and could not reasonably have known) that the individual at the time of hiring or afterward was an alien not authorized to work in the United States.

(iii) Exception

Clause (i) shall not apply in any prosecution under subsection (f)(1) of this section.

(7) Application to Federal Government

For purposes of this section, the term "entity" includes an entity in any branch of the Federal Government.

(b) Employment verification system

The requirement, referred to in paragraphs (1)(B) and (3) of subsection (a) of this section are, in the case of a person or other entity hiring, recruiting, or referring an individual for employment in the United States, the requirements specified in the following three paragraphs:

(1) Attestation after examination of documentation

(A) In general

The person or entity must attest, under penalty of perjury and on a form designated or established by the Attorney General by regulation, that it has verified that the individual is not an unauthorized alien by examining -

(i) a document described in subparagraph (B), or

(ii) a document described in subparagraph (C) and a document described in subparagraph (D).

A person or entity has complied with the requirement of this paragraph with respect to examination of a document if the document reasonably appears on its face to be genuine. If an individual provides a document or combination of documents that reasonably appears on its face to be genuine and that is sufficient :o meet the requirements of the first sentence of this paragraph, nothing in this paragraph shall be construed as requiring the person or entity to solicit the production of any other document or as requiring the individual to produce such another document.

(B) Documents establishing both employment authorization and identity

A document described in this subparagraph is an individuals'

(i) United States passport;

(ii) resident alien card, alien registration, or other document designated by the Attorney General, if the document -

(I) contains a photograph of the individual and such other personal identifying information relating to the individual as the Attorney General finds, by regulation, sufficient or purposes of this subsection,

(II) is evidence of authorization of employment in the United States, and

(III) contains security features to make it resistant to

tampering, counterfeiting, and fraudulent use.

(C) **Documents evidencing employment authorization**

A document described in this subparagraph is an individual's-

(i) social security account number card (other than such a card which specifies on the face that the issuance of the card does not authorize employment in the United States); or

(ii) other documentation evidencing authorization of employment in the United States which the Attorney General finds, by regulation to be acceptable for purposes of this section.

(D) **Documents establishing identity of individual**

A document described in this subparagraph is an individual's-

(i) driver's license or similar document issued for the purpose of identification by a State, if it contains a photograph of the individual or such other personal identifying information relating to the individual as the Attorney General finds, by regulation, sufficient for purposes of this section; or

(ii) in the case of individuals under 16 years of age or in a State which does not provide for issuance of an identification document (other than driver's license) referred to in clause (i), documentation of personal identity of such other type as the Attorney General finds, by regulation provides a

reliable means of identification.

(E) Authority to prohibit use of certain documents

If the Attorney General finds, by regulation, that any document described in subparagraph (B), (C), or (D) as establishing employment authorization or identity does not reliably establish such authorization or identity or is being used fraudulently to an unacceptable degree, the Attorney General may prohibit or place conditions on its use for purposes of this subsection.

(2) Individual attestation of employment authorization

The individual must attest, under penalty of perjury on the form designated or established for purposes of paragraph (1), that the individual is a citizen or national of the United States, an alien lawfully admitted for permanent residence, or an alien who is authorized under this chapter or by the Attorney General to be hired. recruited, or referred for such employment.

(3) **Retention of verification form**

After completion of such form in accordance with paragraphs (1) and (2), the person or entity must retain the form and make it available for inspection by officers of the Service, the Special Counsel for Immigration Related Unfair Employment Practices, or the Department of Labor during a period beginning on the date of the hiring, recruiting or referral of the individual and ending-

(A) in the case of the recruiting or referral for a fee (without hiring) of an individual, three years after the date of the recruiting or referral, and

(B) in the case of the hiring of an individual-

(i) three years after the date of such hiring, or

(ii) one year after the date the individual's employment is terminated, whichever is later.

(4) Copying of documentation permitted

Notwithstanding any other provision of law, the person or entity may copy a document presented by an individual pursuant to this subsection and may retain the copy, but only (except as otherwise permitted under law) for the purpose of complying with the requirements of this subsection.

(5) Limitation on use of attestation form

A form designated or established by the Attorney General under this subsection and any information contained in or appended to such form, may not be used for purposes other than for enforcement of complying with the requirements of this subsection.

(6) Good faith compliance

(A) In general

Except as provided in subparagraphs (B) and (C), a person or entity is considered to have complied with a requirement of this subsection notwithstanding a technical or procedural failure to meet such requirement if there was a good faith attempt to comply with the requirement.

(B) Exception if failure to correct after notice

Subparagraph (A) shall not apply if-

(i) the Service (or another enforcement agency) has explained to the person or entity the basis for the failure,

(ii) the person or entity has been provided a period of not less than 10 business days (beginning after the date of the explanation) within which to correct the failure, and

(iii) the person or entity has not corrected the failure voluntarily within such period.

(C) Exception for pattern or practice violators

Subparagraph (A) shall not apply to a person or entity that has or is engaging in a pattern or practice of violations of subsection (a)(1)(A) or (a)(2) of this section.

(c) No authorization of national Identification cards

Nothing in this section shall be construed to authorize, directly or indirectly, the issuance or use of national identification cards or the establishment of a national identification card.

(d) Evaluation and changes in employment verification system

(1) Presidential monitoring and improvements in system

(A) Monitoring

The President shall provide for the monitoring and evaluation of the degree to which the employment verification system established under subsection (b) of this section provides a secure system to determine employment eligibility in the United States and shall examine the suitability of existing Federal and State identification systems for use for this purpose.

(B) Improvements to establish secure system

To the extent that the system established under subsection (b) of this section is found not to be a secure system to determine employment eligibility in the United States, the President shall subject to paragraph (3) and taking into account the results of any demonstration projects conducted under paragraph (4), implement such changes in (including additions to) the requirements of subsection (b) of this section as may be necessary to establish a secure system to determine employment eligibility in the United States. Such changes in the system may be implemented only if the changes conform to the requirements of paragraph (2).

(2) Restrictions on changes in system

Any change the President proposes to implement under paragraph (1) in the verification system must be designed in a manner so the verification system, as so changed, meets the following requirements:

(A) Reliable determination of identity

The system must be capable of reliably determining whether-

(I) a person with the identity claimed by an employee or

prospective employee is able to work, and

(II)the employee or prospective employee is another individual.

(B) Using of counterfeit-resistant documents

If the system requires that a document be presented to or examined by an employer, the document must be in a form which is resistant to counterfeiting and tampering.

(C) **Limited use of system**

Any personal information utilized by the system may not be made available to Government agencies, employers, and other persons except to the extent necessary to verify that an individual is not an unauthorized alien.

(D) Privacy of information

The system must protect the privacy and security of personal information and identifiers utilized in the system.

(E) Limited denial of verification

A verification that an employee or prospective employee is eligible to be employed in the United States may not be withheld or revoked under the system for any reason other than that the employee or prospective employee is an unauthorized alien.

(F) Limited use for law enforcement purposes

The system may not be used for law enforcement purposes, other than for enforcement of this chapter or

sections 1001, 1028, 1546, and 1621 of Title 18.

(G) **Restriction on use of new documents**

If the system requires individuals to present a new card or other document (designed specifically for use for this purpose) at the time of hiring, recruitment, or referral, then such document may not be required to be presented for any purpose other than under this chapter (or enforcement of sections 1001, 1028, 1546, and 1621 of Title 18) nor to be carried on one's person.

(3) **Notice to Congress before implementing changes**

(A) In general

The President may not implement any change under paragraph (1) unless at least-

(i) 60 days,

(ii) one year, in the case of a major change described in subparagraph (D)(iii), or

(iii) two years, in the case of a major change described in clause (i) or (ii) of subparagraph (D),

before the date of implementation of the change, the President has prepared and transmitted to the Committee on the Judiciary of the House of Representatives and to the Committee on the Judiciary of the Senate a written report setting forth the proposed change. If the President proposes to make any change regarding social security

account number cards, the President shall transmit to the Committee on Ways and Means of the House of Representatives and to the Committee on Finance of the Senate a written report setting forth the proposed change. The President promptly shall cause to have printed in the Federal Register the substance of any major change (described in subparagraph (D)) proposed and reported to Congress.

(B) Contents of report

In any report under subparagraph (A) the President shall include recommendations for the establishment of civil and criminal sanctions for unauthorized use or disclosure of the information or identifiers contained in such system.

(C) **Congressional review of major changes**

(i) Hearings and review

The Committees on the Judiciary of the House of Representatives and of the Senate shall cause to have printed in the Congressional Record the substance of any major change described in subparagraph (D), shall hold hearings respecting the feasibility and desirability of implementing such a change, and, within the two year period before implementation, shall report to their respective Houses findings on whether or not such a change should be implemented.

(ii) Congressional action

No major change may be implemented unless the Congress specifically provides, in an appropriations or other

Act, for funds for implementation of the change.

(D) **Major changes defined**

As used in this paragraph, the term "major change" means a change which would-

(i) require an individual to present a new card or other document (designed specifically for use for this purpose) at the time of hiring, recruitment, or referral,

(ii) provide for a telephone verification system under which an employer, recruiter, or referrer must transmit to a Federal officer information concerning the immigration status of prospective employees and the official transmits to the person, and the person must record, a verification code, or

(iii) require any change in any card used for accounting purposes under the Social Security Act [42 U.S.CA § 301 et seq.]; including any change requiring that the only social security account number cards which may be presented in order to comply with subsection (b)(1)(C)(i) of this section are such cards as are in a counterfeit resistant form consistent with the second sentence of section 205(c)(2)(D) of the Social Security Act [42 U.S.CA § 405(c)(2)(D)].

(E) General revenue funding of social security card changes

Any costs incurred in developing and implementing any change described in subparagraph (D)(iii) for purposes of this subsection shall not be paid for out of any trust fund established under the Social Security Act.

(4) **Demonstration projects**

(A) Authority

The President may undertake demonstration projects (consistent with paragraph (2)) of different changes in the requirements of subsection (b) of this section. No such project may extend over a period of longer than five years.

(B) Reports on projects

The President shall report to the Congress on the results of demonstration projects conducted under this paragraph.

(e) Compliance

(1) Complaints and investigations

The Attorney General shall establish procedures-

(A) for individuals and entities to file written, signed complaints respecting potential violations of subsection (a) or (g)(1) of this section,

(B) for the investigation of those complaints which, on their face, have a substantial probability of validity,

(C) for the investigation of such other violations of subsection (a) or (g)(1) of this section as the Attorney General determines to be appropriate, and

(D) for the designation in the Service of a unit which has, as its primary duty, the prosecution of cases of violations of subsection (a) or (g)(1) of this section under this subsection.

(2) Authority in investigations

In conducting investigations and hearings under this subsection-

(A) immigration officers and administrative law judges shall have reasonable access to examine evidence of any person or entity being investigated,

(B) administrative law judges may, if necessary, compel by subpoena the attendance of witnesses and the production of evidence at any designated place or hearing, and

(C) immigration officers designated by the Commissioner may compel by subpoena the attendance of witnesses and the production of evidence at any designated place prior to the filing of a complaint in a case under paragraph (2).

In case of contumacy or refusal to obey a subpoena lawfully issued under this paragraph and upon application of the Attorney General, an appropriate district court of the United States may issue an order requiring compliance with such subpoena and any failure to obey such order may be punished by such court as a contempt thereof.

(3) **Hearing**

(A) In general

Before imposing an order described in paragraph (4), (5), or (6) against a person or entity under this subsection for a violation of subsection (a) or (g)(1) of this section, the Attorney General shall provide the person or entity with notice and, upon

request made within a reasonable time (of not less than 30 days, as established by the Attorney General) of the date of the notice, a hearing respecting the violation.

(B) Conduct of hearing

Any hearing so requested shall be conducted before an administrative law judge. The hearing shall be conducted in accordance with the requirements of section 554 of Title 5. The hearing shall be held at the nearest practicable place to the place where the person or entity resides or of the place where the alleged violation occurred. If no hearing is so requested, the Attorney General's imposition of the order shall constitute a final and unappealable order.

(C) **Issuance of orders**

If the administrative law judge determines, upon the preponderance of the evidence received, that a person or entity named in the complaint has violated subsection (a) or (g)(1) of this section, the administrative law judge shall state his findings of fact and issue and cause to be served on such person or entity an order described in paragraph (4), (5), or (6).

(4) Cease and desist order with civil money penalty for hiring, recruiting, and referral violations

With respect to a violation of subsection (a)(1)(A) or (a)(2) of this section, the order under this subsection-

(A) shall require the person or entity to cease and desist from such violations and to pay a civil penalty in an amount of-

(i) not less than $250 and not more than $2,000 for

each unauthorized alien with respect to whom a violation of either such subsection occurred.

(ii) not less than $2,000 and not more than $5,000 for each such alien in the case of a person or entity previously subject to one order under this paragraph, or

(iii) not less than $3,000 and not more than $10,000 for each such alien in the case of a person or entity previously subject to more than one order under this paragraph; and

(B) may require the person or entity-

(i) to comply with the requirements of subsection (b) (or subsection (d) of this section if applicable) with respect to individuals hired (or reunited or referred for employment for a fee) during a period of up to three years, and

(ii) to take such other remedial action as is appropriate.

In applying this subsection in the case of a person or entity composed of distinct, physically separate subdivisions each of which provides separately for the hiring, recruiting, or referring for employment, without reference to the practices of, and not under the control of or common control with, another subdivision, each such subdivision shall be considered a separate person or entity.

(5) Order for civil money penalty for paperwork violations

With respect to a violation of subsection (a)(1)(B) of this section, the order under this subsection shall require the

person or entity to pay a civil penalty in an amount of not less than $100.00 and not more than $1,000 for each individual with respect to whom such violation occurred. In determining the amount of the penalty, due consideration shall be given to the size of the business of the employer being charged, the good faith of the employer, the seriousness of the violation, whether or not the individual was an unauthorized alien, and the history of previous violations.

(6) Order for prohibited indemnity bonds

With respect to a violation of subsection (g)(1) of this section, the order under this subsection may provide for the remedy described in subsection (g)(2) of this section.

(7) Administrative appellate review

The decision and order of an administrative law judge shall become the final agency decision and order of the Attorney General unless either (A) within 30 days, an official delegated by regulation to exercise review authority over the decision and order modifies or vacates the decision and order, or (B) within 30 days of the date of such modification or vacation (or within 60 days of the date of the decision and order of an administrative law judge if not so modified or vacated) the decision and order is referred to the Attorney General pursuant to regulations, in which case the decision and order of the Attorney General shall become the final agency decision and order under this subsection. The Attorney General may not delegate the Attorney General's authority under this paragraph to any entity which has review authority over immigration-related matters.

(8) Judicial review

A personal or entity adversely affected by a final order respecting an assessment may, within 45 days after the date the final order is issued, file a petition in the Court of Appeals for the appropriate circuit for review of the order.

(9) Enforcement of orders

If a person or entity fails to comply with a final order respecting an assessment may, within 45 days after the date the final order is issued under this subsection against the person or entity, the Attorney General shall file a suit to seek compliance with the order in any appropriate district court of the United States. In any such suit, the validity and appropriateness of the final order shall not be subject to review.

(f) Criminal penalties and injunctions for pattern or practice valuations

(1) Criminal penalty

Any person or entity which engages in a pattern or practice of violations of subsection (a)(1)(A) or (a)(2) of this section shall be fined not more than $3000 for each unauthorized alien with respect to whom such a violation occurs, imprisoned for not more than six months for the entire pattern or practice, or both, notwithstanding the provisions of any other Federal law relating to fine levels.

(2) Enjoining of pattern or practice violations

Whenever the Attorney General has reasonable cause to believe that a person or entity is engaged in a pattern or

practice of employment, recruitment, or referral in violation of paragraph (1)(A) or (2) of subsection (a) of this section, the Attorney General may bring a civil action in the appropriate district court of the United States requesting such relief, including a permanent or temporary injunction , restraining order, or other order against the person or entity, as the Attorney General deems necessary.

(g) Prohibition of indemnity bonds

(1) Prohibition

It is unlawful for a person or other entity, in the hiring, recruiting, or referring for employment of any individual, to require the individual to post a bond or security, to pay or agree to pay an amount, or otherwise to provide a financial guarantee or indemnity, against any potential liability arising under this section relating to such hiring, recruiting, or referring of the individual.

(2) Civil penalty

Any person or entity which is determined, after notice and opportunity for an administrative hearing under subsection (e) of this section, to have violated paragraph (1) shall be subject to a civil penalty of $1,000 for each violation and to an administrative order requiring the return of any amounts received in violation of such paragraph to the employee or, if the employee cannot be located, to the general fund of the Treasury.

(h) Miscellaneous provisions

(1) Documentation

In providing documentation or endorsement of authorization of aliens (other than aliens lawfully admitted for permanent residence) authorized to be employed in the United States, the Attorney General shall provide that any limitations with respect to the period or type of employment or employer shall be conspicuously stated on the documentation or endorsement.

(2) Preemption

The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.

(3) Definition of unauthorized alien

As used in this section, the term "unauthorized alien" means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General.

Sec. 31-275. Definitions. As used in this chapter, unless the context otherwise provides:

(9) (A) "Employee" means any person who:

(i) Has entered into or works under any contract of service. . .

Supreme Court, U.S.
FILED
OCT 26 1998
CLERK

No. 98-502

In The

Supreme Court of the United States

October Term, 1998

SOL SLOTNIK and DIANE REVERAND,

Petitioners,

vs.

VICTORIA DOWLING CONSIDINE
and THE SECOND INJURY FUND,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Connecticut

BRIEF IN OPPOSITION FOR RESPONDENT VICTORIA DOWLING CONSIDINE

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INTRODUCTION

This case involves a challenge to an award of benefits under Connecticut's Workers' Compensation Act (hereinafter "WCA"). Interpreting state statutory provisions, a Connecticut workers' compensation commissioner concluded that the state legislature intended its WCA to be open to all covered employees injured on the job, regardless of their citizenship or immigration status. This decision was affirmed at each stage of review, including the Connecticut Supreme Court, Connecticut's highest state court.

The *pro se* Petitioners have requested the Court to review this decision, effectively seeking plenary review of an issue of state law. Additionally, they did not properly raise the issue below. Finally, the Petitioners do not identify a single conflicting decision holding that a state's decision to permit undocumented aliens the remedy of workers' compensation is preempted by federal law.

Because the Petitioners seek certiorari on a splitless question not properly raised below, and on a matter correctly decided by the Connecticut Supreme Court, the Respondent respectfully requests that the Court deny the instant petition.

STATEMENT OF THE CASE

On February 28, 1994, Respondent Victoria Dowling Considine slipped and fell on an icy driveway and sustained serious and disabling injuries arising out of and in the course of her employment. These injuries have rendered her totally incapacitated and medically unable to work, continuing to the present time. At the time of her injury, she was employed as a live-in housekeeper and nanny by the *pro se* Petitioners.

The Petitioners had also represented to Ms. Considine that she would be provided with health insurance, and withheld money from her pay under the representation that it was being applied to health insurance premiums, however they never obtained health insurance for Ms. Considine. At the time of her employment, Ms. Considine, a native of England, was an undocumented alien due to the fact that her work authorization had expired, a status the Petitioners were fully aware of before hiring her. Subsequent to her injuries, the Respondent married a United States citizen, and as of August 7, 1996, has been lawfully present in the United States and legally available for work.

The Respondent sought compensation from the Petitioners pursuant to Connecticut's WCA, Connecticut General Statutes § 31-275 *et seq.* The *pro se* Petitioners vigorously contested paying any benefits to the Respondent, arguing that she was not properly considered an employee under the WCA due to her undocumented status[1].

This argument was considered and rejected by the trial commissioner, the Compensation Review Board, and the Connecticut Supreme Court. At no time below did the Petitioners claim that the Respondent's immigration status only prohibited the receipt of wage related compensation. Additionally, the Petitioners never even cited to the Court's decision in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), until after oral argument before the Connecticut Supreme Court. When the Respondent sought a transfer to the Connecticut Supreme Court from the Appellate Court, the Petitioners

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1. The Petitioners also raised various state law arguments which are not addressed here as they do not relate to the question presented or jurisdiction of the Court.

objected, claiming this matter was not serious enough to require the Connecticut Supreme Court to review the case[2].

REASONS FOR DENYING THE WRIT

I.

THE CERTIORARI PETITION SHOULD BE DENIED BECAUSE IT SEEKS PLENARY REVIEW OF A QUESTION OF STATE LAW OVER WHICH THE COURT HAS NO JURISDICTION.

The Petitioners ask the Court to review the decision of the Connecticut Supreme Court holding that undocumented aliens are properly considered employees under Connecticut's Workers' Compensation Act. Although the Petitioners cite to 28 U.S.C. § 1257(a) as the basis for the Court's jurisdiction, the petition itself contains no analysis of how the question presented triggers the jurisdiction of the Court.

The only potentially applicable clause of 28 U.S.C. § 1257(a) is as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States.

Therefore, the Court is jurisdictionally limited to deciding whether the application of Connecticut's Worker's

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2. Pursuant to Connecticut's Rules of Appellate Procedure § 65-1 and § 65-2, the Connecticut Supreme Court has the discretion to transfer a case to itself from the Appellate Court.

Compensation Act (hereinafter "WCA") to include undocumented aliens is "repugnant to the Constitution, treaties, or laws of the United States." *Id.* In the context of this case, the only available legal theory under which the Court could review the Connecticut Supreme Court's decision is one of express or implied preemption by the federal immigration laws, specifically the Immigration Reform and Control Act of 1986 (hereinafter "IRCA").

The question presented by Petitioners, and their reasons for granting the writ, do not raise an issue of preemption, but rather seek plenary review from the Court as to whether the Connecticut Supreme Court correctly interpreted Connecticut's Worker's Compensation Act in light of the policies behind the IRCA. This is beyond the jurisdiction of the Court. Even the lone dissenting opinion by Justice McDonald of the Connecticut Supreme Court did not suggest that the majority's interpretation of the WCA presented a preemption problem, but merely concluded that as a question of policy the State of Connecticut should not include undocumented aliens within the scope of the WCA. *Dowling v. Slotnick*, 244 Conn. 781, 819-821, 712 A.2d 396 (1998).

> States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety, and workmen's compensation laws are only a few examples.

DeCanas v. Bica, 424 U.S. 351, 356 (1976) (holding that California statute which affected employment of illegal aliens was not preempted by the Immigration and Nationalization Act).

To the extent that the issue of preemption may be considered a "subsidiary question fairly included" within the question presented pursuant to Sup. Ct. R. 14(a), it is not deserving of review by the Court. Firstly, the Petitioners fail to even use the word *preemption*, or cite to the Supremacy Clause of the Federal Constitution, a single time in their question presented or reasons for granting the writ. The Supremacy Clause of the Federal Constitution is not even listed in the Petitioners' table of authorities. These facts alone speak volumes on whether they have a valid preemption claim.

Additionally, there is no split of authority on this issue. The Court has made clear that a guiding consideration for review of a case is the existence of a conflict between a decision of a state court of last resort and another state court of last resort or of a United States Court of Appeals on an important federal question. Sup. Ct. R. 10(b). In the present case, the Petitioners do not cite, and the Respondent has been unable to locate, a single case from any jurisdiction suggesting that a state's considering undocumented aliens to be within the scope of its worker's compensation laws is preempted by federal law.

Every one of the cases that the Petitioners cite as allegedly conflicting with the decision below involve the proper interpretation of a federal labor statute in light of the IRCA, in which the question was whether Congress intended to allow undocumented workers to enjoy remedial benefits under a particular federal law. None of them involved, as this case does, the question whether, under the Supremacy Clause, IRCA prohibits a state from choosing to permit undocumented workers to obtain a remedy under the state's law. Thus, none of these cases ever touched upon the strong presumption against preemption of state law which the Court consistently applies. Therefore, there is no conflict between either the holdings or reasoning of any of the cases cited by the Petitioners and this case.

As a general rule, "consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." *Building & Constr. Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 223-24 (1993). "We start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*, 116 S. Ct. 2240, 2250 (1996).

Petitioners have provided no analysis as to why the application of a state's worker's compensation law should be deemed preempted by the federal immigrations laws, for the simple reason that no viable argument is available. Instead, they request the Court to use the generalized concept of undocumented aliens to address issues which are simply not presented in the actual case or controversy before the Court.

Additionally, "the purpose of Congress is the touchstone in every pre-emption case." *Id.* The result the Petitioners argue for would expressly contradict the intent of Congress in enacting the IRCA. The House Judiciary Committee expressly stated that "[i]t is not the intention of the Committee that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections in existing law." House Judiciary Report on the IRCA, H.R. Rep. No. 682(I), 99 Cong. 2d Sess. 58 (1986), U.S. Code Cong. & Admin. News 1986, pp. 5649, 5662. The House Committee on Education and Labor also explained that "the committee does not intend that any provision of this Act would limit the powers of State or Federal labor standards agencies." House Committee on Education and Labor Report on the IRCA, H.R. Rep. No. 99-682(II), 99 Cong. 2d Sess. 58 (1986), U.S. Code Cong. & Admin. News 1986, p. 5758. These expressions of legislative understanding clearly demonstrate that Congress did not intend to undermine or diminish a state labor protection such as workers' compensation.

Therefore, the petition for writ of certiorari should be denied.

II.

THE CERTIORARI PETITION SHOULD BE DENIED BECAUSE THE QUESTION PRESENTED WAS NOT PRESSED OR PASSED UPON IN THE COURTS AND ADMINISTRATIVE AGENCIES BELOW.

> It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system.

Webb v. Webb, 451 U.S. 493, 496-497 (1981). Although later cases have questioned whether this rule is truly jurisdictional as opposed to a prudential restriction, it is clear that

> "at the minimum, there should be no doubt from the record that a claim under a federal statute or the Federal Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by state law."

Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 77-78 (1988) (quoting *Webb, supra*).

The question presented by the Petitioners is whether the payment of wage related benefits to an injured employee under a state workers' compensation act conflicts with the policies of IRCA and the Court's decision in *Sure-Tan, Inc. v. NLRB*,

467 U.S. 883 (1984). This issue was never properly raised below. In all of the proceedings below, Petitioners claimed that the Respondent was not an employee under the terms of the workers' compensation act, and therefore was entitled to *no* benefits since, they claimed, the workers' compensation commission had no jurisdiction.

The Petitioner's argument to this Court is premised entirely upon *Sure-Tan*, however their principal brief to the court below did not ever mention this case. In fact, it was the Respondent who relied upon *Sure-Tan* since the actual issue being litigated was whether the Respondent was properly considered an employee under the state's worker's compensation act. The Petitioners' first mention of *Sure-Tan* was in a supplemental reply letter submitted after oral argument before the Connecticut Supreme Court. "It is a well established principle, however, that arguments cannot be raised for the first time in a reply brief." *Saturn Construction Co. v. Premier Roofing Co.*, 238 Conn. 293, 312, n.14, 680 A.2d 1274, 1284 (1996).

This claim was clearly not properly raised below as the Respondents and tribunals were not "apprised of the nature or substance of the federal claim at the time and in the manner required by state law." *Bankers Life & Casualty Co.*, *supra*, 486 U.S. at 77-78. The Petitioners' attempt to change the issue to solely one of wages for the first time before this Court is entirely improper, and unfair both to the Respondent and to the State of Connecticut.

> Principles of comity in our federal system require that the state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state authority based upon federal law, or, if the litigation is wholly private, construing and applying the applicable federal requirements.

Webb, *supra*, 451 U.S. at 499.

Connecticut's Worker's Compensation Act does not solely provide wage related benefits. One of the most significant benefits is the payment of all medical expenses reasonably related to the injury. Connecticut General Statutes § 31-294d. Additionally, an employee such as the Respondent who suffers a permanent disability is entitled to a specific award for the permanent injury. Connecticut General Statutes § 31-308. "Specific benefits are benefits for the loss or loss of the use of specific body parts." *Levanti v. Dow Chemical Co.*, 218 Conn. 9, 13, 587 A.2d 1023 (1991). "In fact, permanent partial schedule awards are based upon medical condition after maximum improvement has been reached and ignore wage loss entirely." *Id.*

At all times below, Petitioners have taken the position that the Respondent was not an employee under Connecticut's Worker's Compensation Act and therefore entitled to no benefits. The question presented is an entirely different issue which was never ruled upon in any of the proceedings below for the simple reason that it was not raised.

The Petitioners newly raised issue is a patent attempt to bootstrap themselves into a circuit conflict even though none exists as to the actual issues raised and decided in this case. Therefore, the petition for writ of certiorari should be denied.

III.

THE CERTIORARI PETITION SHOULD BE DENIED BECAUSE IT DOES NOT PRESENT ANY IMPORTANT FEDERAL QUESTIONS, AND THERE ARE NO CONFLICTS AMONG THE STATES OR FEDERAL COURTS OVER WHETHER UNDOCUMENTED ALIENS MAY RECEIVE STATE WORKER'S COMPENSATION BENEFITS.

"A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. The "decision to grant certiorari represents a commitment of scarce judicial resources." *City of Oklahoma v. Tuttle*, 471 U.S. 808, 815-16 (1985). The present case is simply a decision of a state court that state law permits the state remedy of worker's compensation to an injured state resident.

As discussed above, there is no conflict of authority on the issues actually raised in this case. The decisions which the Respondent has located have been unanimous that "illegal entry into this country does not deprive an alien of his compensation rights." Larson, *Workers' Compensation*, § 35.20 (Matthew Bender & Co., Inc., New York, 1997). *See Rivera v. United Masonry, Inc.*, 948 F.2d 774 (D.C. Cir. 1991); *Testa v. Sorrento Restaurant, Inc.*, 197 N.Y.S. 2d 560 (N.Y. App. 1960); *Cenvill Development Corp. v. Candelo*, 478 So. 2d 1168 (Fla. App. 1985); *Gene's Harvesting v. Rodriguez*, 421 So. 2d 701 (Fla. App. 1982); *Commercial Standard Fire and Marine Co. v. Galindo*, 484 S.W. 2d 635 (Tex. App. 1972); *Mendoza v. Monmouth Recycling Corp.*, 672 A.2d 221 (N.J. App. 1996); *Artiga v. M.A. Patout & Son*, 671 So. 2d 1138, 1139 (La. App. 1996); *Lang v. Landeros*, 918 P.2d 404, 406 (Okla. App. 1996); *Villa v. Eastern Wire Products Co.*, 554 A.2d 644 (R.I. 1989); 82 Am. Jur. 2d, Workers' Compensation § 146.

The Petitioners have failed to cite a single case where any court denied the right of an undocumented alien to receive benefits under a state worker's compensation statute for any reason, let alone a reason amounting to an "important federal question." Sup. Ct. R. 10(b).

In an attempt to persuade the Court to review the case, the Petitioners invite the Court to create a "bright line standard" for the rights of undocumented aliens in all cases, regardless of the source of the claimed right. Petition at 21. This goes far beyond the proper function of the Court. "According to the express provision of Article III, the judicial power of the United States is limited to 'Cases' and 'Controversies.' " *Mistretta v. United States*, 488 U.S. 361, 385 (1989). In implementing this limited grant of power, the Court has "refused to issue advisory opinions." *Id.*

The Petitioners' reliance upon *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), is clearly misplaced. In *Sure-Tan*, the Court held that undocumented workers were properly considered employees under the NLRA. *Id.* at 891-894. The Court reasoned, as did the Connecticut Supreme Court in the present case, that since the legislature did not exclude undocumented aliens from the definition of *employee*, the Court should not modify the definition itself. *Id.* at 891-892. The Court also expressed the same policy furthered by including undocumented aliens in the definition of employee which was noted by the Connecticut Supreme Court and every other court cited above which has passed upon the issue,

> to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment.

Sure-Tan, 467 U.S. at 893.

The Court also held that the court of appeals improperly awarded back pay and reinstatement to the undocumented aliens under the specific facts of that case. *Id.* at 898-905. However, this decision encompassed a careful interpretation and balancing of the respective statutory language and policies of the INA and NLRA.

The question presented by the Petitioner appears to misconstrue the proper role of the Court in this regard. In interpreting Title VII, the NLRA, or the FLSA, the Court is jurisdictionally entitled to engage in ordinary statutory construction and is entitled to plenary review of the proper interpretation. In interpreting state or local laws, the Court is jurisdictionally limited to analyzing whether the law is preempted by federal law.

The Petitioners' invitation for the Court to use a case about state workers' compensation benefits as a springboard for precluding relief to undocumented aliens under all federal, state, and local laws relating to wage related benefits quite simply goes too far. The Court is not in the business of issuing sweeping advisory opinions, and the careful analysis and balancing which is required to properly decide the interplay between the immigration laws and other federal, state or local laws is entirely unsuited for the type of judicial legislation which the Petitioners seek.

The facts and law pertinent to this case highlight the problems inherent in the type of law the Petitioners are asking the Court to create. The Petitioners essentially claim that the Respondent should not be entitled to wage related compensation for the period of time she was medically unable to work and was also undocumented. However, Connecticut's Worker's Compensation Act is intended to provide compensation for injuries arising out of and in the course of employment which

render a person physically unable to work. *Dowling v. Slotnick*, 244 Conn. 781, 799, 712 A.2d 396 (1998). There is no requirement that they be otherwise legally able to work for the particular employer.

> If the claimant is totally disabled, as the trial commissioner found her to be, she is by definition unable to work in any capacity based upon her medical condition. See Connecticut General Statutes § 31-307. Thus, whether she is an illegal alien or not, she simply cannot work.

Compensation Review Board Opinion dated February 5, 1997, p. 60a of Petitioner's Appendix. If the Respondent had not been injured, she would have been legally able to work in England, Canada, or numerous other countries and territories throughout the world. Therefore, she suffered a loss to which she is entitled to compensation under Connecticut law, which is in no way "repugnant to the Constitution, treaties, or laws of the United States." 28 U.S.C. § 1257(a).

This is in marked contrast with the federal statutes, not raised in this case, which the Petitioners seek to amalgamate for purposes of a "bright line standard." These statutes generally seek to compensate a person for damages suffered by not obtaining the benefits they otherwise would have received from a specific employer had that employer not engaged in the prohibited conduct.

Even under the federal statutes, it seems a distinction would be drawn as between employers who also operated in countries the employee could legally work in, or employers for whom an employee could obtain work authorization if they obtained work from the employer. There are numerous other hypotheticals which could be constructed, the point is simply that the Court

should not engage in sweeping judicial legislation which would significantly impact countless persons not before the Court on issues not even relevant to this case.

Article I, § 8 of the Constitution delegates the authority to Congress to determine whether a "bright line standard" should be established as to whether undocumented aliens are entitled to wage related benefits under various federal, state, and local laws. The Congress has not done so, and the Court should decline the Petitioners' invitation to rely upon penumbral emanations from the assumed policies of various statutes, not constitutional in nature, to create a sweeping rule that the legislature has declined to enact. It is also debatable whether the Congress could validly force a state worker's compensation commission to effectively act as an enforcement wing of the INS. *See Printz v. United States*, 117 S. Ct. 2365 (1997); *New York v. United States*, 505 U.S. 144 (1992). Therefore, the petition for writ of certiorari should be denied.

CONCLUSION

The *pro se* certiorari petition should be denied because it seeks plenary review of a question of state law over which the Court has no jurisdiction. The certiorari petition should also be denied because the question presented was not pressed or passed upon below. Finally, the certiorari petition should be denied because it does not present any important federal questions, and there are no conflicts among the states or federal courts over whether undocumented aliens may receive state worker's compensation benefits.

Respectfully submitted,

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